REPORT

on

ADMINISTRATION OF ONTARIO COURTS

ONTARIO LAW REFORM COMMISSION

PART II

MINISTRY OF THE ATTORNEY GENERAL **1973**

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PART II

MINISTRY OF THE ATTORNEY GENERAL

The Ontario Law Reform Commission was established by section 1 of *The Ontario Law Reform Commission Act, 1964*, for the purpose of promoting the reform of the law and legal institutions. The Commissioners are:

H. Allan Leal, Q.C., LL.M., LL.D., *Chairman*
Honourable James C. McRuer, O.C., LL.D., D.C.L.
Honourable Richard A. Bell, P.C., Q.C.
W. Gibson Gray, Q.C.
William R. Poole, Q.C.

The Secretary of the Commission is Miss A. F. Chute, and its offices are located on the Sixteenth Floor at 18 King Street East, Toronto, Ontario, Canada.

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ONTARIO LAW REFORM COMMISSION

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To The Honourable Dalton A. Bales, Q.C.,
Attorney General for Ontario,
18 King Street East,
Toronto, Ontario.

Dear Mr. Attorney:

We have the honour to submit herewith Part II of the Report on Administration of Ontario Courts.

CHAPTER 1

THE PROVINCIAL COURTS (CRIMINAL DIVISION)

SUMMARY

A. Introduction

In Part I of this Report we expressed the view that the administration of justice in Ontario ranks very low on the scale of financial priorities regulating the provision of governmental services to the public.[1] Perhaps nowhere is this more evident than in the administration of justice in the

[1]At p. 6.

Provincial Courts (Criminal Division), described in the McRuer Commission Report as "probably the most important and most neglected court[s] in Ontario".[2]

Over 2,000,000 cases were disposed of in the Provincial Courts (Criminal Division) in Ontario in 1971 (the latest year for which figures are available).[3] Of this total more than 90% involved offences which for convenience we shall refer to generally as provincial offences: offences under municipal by-laws (approximately 35% of the total number of cases), offences under *The Highway Traffic Act*[4] (approximately 48%), offences under *The Liquor Control Act*[5] (approximately 6%) and offences under other provincial statutes (approximately 2%). The remaining cases (slightly under 10% of the total) involved criminal offences, namely offences under the *Criminal Code* or under other federal statutes. In practice all criminal cases are tried by Provincial judges, while provincial offences are tried either by Provincial judges or justices of the peace. Even though the criminal cases constitute only 10% in volume of the workload of the Provincial Courts (Criminal Division), these cases represent about 95% of the total volume of criminal cases tried in Ontario.[6] It may be noted further that even where an accused person is not ultimately tried in the Provincial Courts (Criminal Division), his first appearance or appearances will almost inevitably be before a Provincial judge who will conduct the preliminary inquiry.

It has been pointed out elsewhere that in terms of the seriousness of the offences over which jurisdiction is granted, the jurisdiction of the Provincial Courts (Criminal Division) is broader than that given to any lower court of criminal jurisdiction in Europe, the Commonwealth or the United States, and that in terms of the severity of the sentence which a Provincial judge may impose, "no lower court judge sitting alone in any other country" is given such broad power.[7] Since that observation was made, the jurisdiction of the Provincial Courts (Criminal Division) has been extended even further.[8]

The importance of the Provincial Courts (Criminal Division) cannot be overemphasized. If the primary goal of the court system is to serve the public, this being one of the premises upon which this Report is based, then the Provincial Courts (Criminal Division) are beyond doubt the most important courts in Ontario. The vast majority of our citizens who appear in court make their appearance exclusively in these courts, which have very great powers over the individuals tried therein. But it is not only persons accused of an offence who are affected by the administration of justice in these courts. Witnesses and other persons, such as friends and relatives attending as spectators, are also affected. Thus a great many attitudes about

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[2]McRuer Commission Report 526 (Report No. 1, Vol. 2, 1968).

[3]*Annual Report of the Inspector of Legal Offices* 45 (Province of Ontario, 1971).

[4]R.S.O. 1970, c. 202.

[5]R.S.O. 1970, c. 249.

[6]McRuer Commission Report, n. 2 *supra*, at p. 526; *Report of the Canadian Committee on Corrections* 18 (1969).

[7]Hogarth, *Sentencing as a Human Process* 35-36 (1971).

[8]*Criminal Law Amendment Act*, S.C. 1972, c. 13.

the quality of justice administered in Ontario are likely to be formed on the basis of experiences in the Provincial Courts (Criminal Division).

As a result of a series of recommendations contained in the McRuer Commission Report, a number of changes were made in these courts in 1968.[9] The Magistrates' Courts became the Provincial Courts. Two divisions were created, namely the Provincial Courts (Criminal Division) and the Provincial Courts (Family Division). Minimum professional qualifications were specified for the exercise of certain powers or duties under the *Criminal Code*. A Judicial Council for Provincial judges was created to advise the Attorney General, with respect to new appointments when consulted and to receive and investigate complaints ". . . respecting the misbehaviour of or neglect of duty by judges or the inability of judges to perform their duties . . .".[10] Salaries were increased substantially.

Despite the changes effected in 1968, the status of the Provincial Courts (Criminal Division) in Ontario remains low. The following passage reflects with some accuracy the position of a Provincial judge under the *Criminal Code*:[11]

> . . . [T]he Criminal Code puts him in an inferior position by treating him as a third class judge — below the Supreme and County Court judge . . . An example of the inferior status of the magistrate as envisaged by the Code is the *trial de novo*, a procedure which permits either the accused or the Crown to appeal from the magistrate's decision in a summary conviction case and have a complete rehearing of the case by a County Court judge. An absolute right to a rehearing after a trial by a magistrate is surely undermining and unnecessary.

The "lower court" status of the Provincial Courts (Criminal Division) is also reflected in more subtle ways. Defence counsel and Crown attorneys appearing before them tend to have fewer years of experience than those who appear in the other criminal courts. Counsel also seem to take greater liberties than in the other courts with respect to requesting adjournments, either because of personal scheduling conflicts or for other reasons.

One of the best indications of the low status of the Provincial Courts (Criminal Division) is the continuous failure to allocate resources to those courts consistent with their obvious needs.[12] One need only compare the facilities at "Old City Hall" (where the majority of cases in the Provincial Courts (Criminal Division) in Metropolitan Toronto are tried) with those

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[9]*The Provincial Courts Act, 1968*, S.O. 1968, c. 103, now *The Provincial Courts Act*, R.S.O. 1970, c. 369.

[10]*Ibid.* s. 8(1)(b).

[11]Friedland, "Magistrates' Courts: Functioning and Facilities" (1968-9), 11 Crim. Law Q. 52, at p. 71. We recommended in chapter 5 of Part I of this Report that the trial *de novo* in summary conviction offences be replaced by an appeal on the record.

[12]In 1971 the cost of operation of the Provincial Courts (Criminal Division) amounted to almost $16,000,000 excluding the cost of providing legal aid or Crown attorneys. It is interesting to observe that almost $30,000,000 was collected in fines by the Provincial Courts (Criminal Division) in 1971: *Annual Report of the Inspector of Legal Offices* 9 (1971).

of the new Toronto Court House to observe the low priority given to the Provincial Courts (Criminal Division) in relation to the other courts.

The failure to allocate sufficient resources to the administration of justice in the Provincial Courts (Criminal Division) is in our view highly regrettable. The factors which are integral to the concept of a "lower court" are the very factors which demand that greater attention be given to that court in terms of resources and facilities. Some of these factors are the number of people affected by these courts, their broad jurisdiction and the resulting voluminous caseload.

As will become evident, because of their massive caseloads the Provincial Courts (Criminal Division) face the most serious administrative problems in disposing of cases. As we indicated in Part I of this Report,[13] we hope this trend will be reversed by integrating court administration under a Provincial Director of Court Administration, to be responsible for the overall supervision and direction of the non-adjudicative, administrative aspects of all the courts, and five or six Regional Directors of Court Administration, to be responsible for the administration of all courts operating in their respective regions. The recommendations contained in this chapter are put forward within the context of the structure of court administration outlined in Part I of this Report.[14] The next Section of this chapter is concerned with a number of preliminary matters which should be resolved immediately in order that the framework for the administration of the business of the Provincial Courts (Criminal Division) may be strengthened. Section C is concerned with the day-to-day administration of that business at the local level in Ontario generally, and particularly in Metropolitan Toronto. The disposition of provincial offences is considered separately in Section D.

B. Preliminary Matters

1. *Structure of the Provincial Courts (Criminal Division)*

In order that the recommendations contained in this Report with respect to the administration of justice in the Provincial Courts (Criminal Division) may appear in a clear perspective, it is useful to set out the present constitution of these courts, together with some general recommendations as to its reform. In this manner a basis will be established for the discussion which follows in the remainder of the chapter.

The present constitution of the Provincial Courts (Criminal Division) appears to be a loose one. Section 14 of *The Provincial Courts Act*[15] provides:

> 14. There shall be in and for every county and district a court of record to be styled,
>
> (a) in counties, the "Provincial Court (Criminal Division) of

[13]At p. 25.

[14]See chapter 2 thereof.

[15]R.S.O. 1970, c. 369. The Act also contains provisions governing the Provincial Courts (Family Division).

the County (*or* Judicial District *or* United Counties) of (*naming the county etc.*)";

(b) in districts, the "Provincial Court (Criminal Division) of the District of (*naming the district*)",

presided over by a judge.

A "judge" is defined under section 1 of the Act as "a provincial judge appointed under this Act". Under section 2, the Lieutenant Governor in Council on the recommendation of the Attorney General "may appoint such provincial judges as he considers necessary". Thus as many Provincial judges as may be required may be appointed. In practice, there tends to be an informal "establishment" of Provincial judges; at present that establishment for the Criminal Division numbers 123 and there are eight vacancies. There are six part-time Provincial judges. The Provincial Courts (Criminal Division) are presided over by a Chief Judge, and the Province is divided into 10 regions with a senior judge designated for each region.

Every judge has territorial jurisdiction "throughout Ontario",[16] so that appointments are made "in and for the Province of Ontario" rather than for a specific county or district. *The Provincial Courts Act* also provides that regard shall be had to "the desirability of rotating the judges" in the arrangement of the courts and in the assignment of judges by the Chief Judge.[17] The judges of the Provincial Court (Criminal Division) of each county or district may hold sittings at any place in the county or district designated by the Chief Judge of the Provincial Courts (Criminal Division).[18] Finally, it is provided that a judge shall exercise the powers and perform the duties vested in him as a magistrate, provincial magistrate or one or more justices of the peace under section 9 sitting in a Provincial Court (Criminal Division).[19]

The jurisdiction and duties of the Provincial judges may be conveniently summarized as follows:

(1) the trial of those indictable offences under the *Criminal Code* and other federal statutes which are within the "absolute jurisdiction" of a Provincial judge or for which an accused is entitled to make an election and has elected trial by a Provincial judge;[20]

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[16]Section 9(1) of *The Provincial Courts Act* provides as follows:

9. (1) Every judge has jurisdiction throughout Ontario and,

(a) shall exercise all the powers and perform all the duties conferred or imposed upon a provincial judge by or under any Act of the Legislature or of the Parliament of Canada;

(b) has all the power and authority vested by or under any Act of the Legislature in a magistrate, two justices of the peace sitting together or a juvenile and family court or a judge thereof;

(c) subject to subsection 2, may exercise all the powers and perform all the duties conferred or imposed upon a magistrate, provincial magistrate or one or more justices of the peace under any Act of the Parliament of Canada;

(d) is *ex officio* a justice of the peace and commissioner for taking affidavits.

[17]R.S.O. 1970, c. 369, s. 10(3)(4).

[18]*Ibid.* s. 16.

[19]*Ibid.* s. 15.

[20]*Criminal Code*, ss. 483, 484.

(2) the conducting of preliminary inquiries with respect to indictable offences under the *Criminal Code* and other federal statutes;[21]

(3) the trial of summary conviction offences under the *Criminal Code* and other federal statutes, the Provincial judge sitting in such circumstances being constituted a "summary conviction court";[22]

(4) the exercise of further powers under the *Criminal Code* such as stating cases for appeal,[23] conducting "show cause" hearings with respect to interim custody or release with or without bail,[24] receiving informations and issuing summonses,[25] search warrants,[26] bench warrants and warrants of committal;[27]

(5) the trial under *The Summary Convictions Act*[28] (discussed in greater detail later) of offences arising under provincial statutes, including related duties such as the ones outlined in (4) above;

(6) the carrying out of duties assigned under various provincial statutes, described more fully later in the chapter; and

(7) the carrying out of various extra-judicial duties, also discussed later in the chapter.

Another aspect of the operation of the Provincial Courts (Criminal Division) which must be considered relates to the jurisdiction and functions of justices of the peace. Their jurisdiction coincides to some extent with that of the Provincial judges, although they do not exercise their jurisdiction as judicial officers of the Provincial Courts.

Justices of the peace are appointed pursuant to section 2(1) of *The Justices of the Peace Act*,[29] which provides that the Lieutenant Governor "may appoint justices of the peace in and for Ontario or any part thereof". In 1971 (the latest year for which figures are available) there were 1,003 justices of the peace in Ontario,[30] some of whom received full-time salaries, others receiving fees on a "piecework" basis, and still others being inactive. Most justices of the peace are appointed for the entire Province. Some, however, are appointed to particular counties and districts. We make recommendations concerning the qualifications of justices of the peace and other aspects of their appointment and duties later in the chapter. For our present purposes we are concerned with examining their jurisdiction and considering it in relation to that of the Provincial judges.

The jurisdiction of justices of the peace with respect to offences under the *Criminal Code* (and other federal statutes) would appear to be the

[21]But see *ibid.* ss. 463 ff.
[22]*Ibid.* ss. 720 ff.
[23]*Ibid.* s. 762.
[24]*Ibid.* s. 457.
[25]*Ibid.* s. 455.3 as enacted by S.C. 1970-71, c. 37, s. 5; s. 728.
[26]*Ibid.* s. 443.
[27]*Ibid.* s. 458.
[28]R.S.O. 1970, c. 450.
[29]R.S.O. 1970, c. 231.
[30]*Annual Report of the Inspector of Legal Offices* 40-2 (1971).

same as that of the Provincial judges, except that justices of the peace may not try indictable offences. The powers described earlier to conduct preliminary inquiries, to try summary conviction offences under the *Criminal Code*, and to carry out other duties under the *Code*, are conferred on a "justice", defined in section 2 of the *Criminal Code* as a justice of the peace as well as a Provincial judge.

The jurisdiction of justices of the peace (and of Provincial judges[31]) with respect to the trial of provincial offences and duties related thereto is set out in *The Summary Convictions Act*. This Act incorporates by reference Part XXIV of the *Criminal Code* (the trial of summary conviction offences) together with certain other sections of the *Code*, which constitute the justice of the peace (or Provincial judge) trying the offence a "summary conviction court".[32] However, the incorporation of the *Criminal Code* provisions is subject to any special provisions contained in *The Summary Convictions Act* (for example, with regard to the issuing of summonses and search warrants) or to any special provisions contained in any other provincial statute governing the offence in question (such as the requirement under *The Liquor Control Act*[33] that prosecutions under that Act shall take place before a Provincial judge or two or more justices of the peace where no Provincial judge is available).

In addition to their foregoing jurisdiction, justices of the peace also exercise a variety of powers conferred under various other provincial statutes, such as inquiring into complaints by employees with respect to the non-payment of wages,[34] issuing search warrants under particular statutes,[35] and arresting and causing to be imprisoned persons committing certain offences with respect to the conduct of elections.[36]

Further statutory provisions concerning justices of the peace are contained in section 6 of *The Justices of the Peace Act*, which provides as follows:

> 6. (1) A justice of the peace acting within his territorial jurisdiction,
>
> (a) may take informations or issue search warrants, summonses or warrants returnable before a provincial judge; and
>
> (b) may hear and determine prosecutions under municipal by-laws.
>
> (2) Except as provided in subsection 1, a justice of the peace shall not act in any case except under the direction of a provincial judge.

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[31]See section 1 of *The Summary Convictions Act*, where "justice" is defined as "a justice of the peace, and includes two or more justices sitting and acting together, a provincial judge, and every other officer or functionary having for the purposes of any Act the authority of a justice or provincial judge".

[32]*Criminal Code*, s. 720(1).

[33]R.S.O. 1970, c. 249, s. 102.

[34]*The Master and Servant Act*, R.S.O. 1970, c. 263, s. 4.

[35]*The Game and Fish Act*, R.S.O. 1970, c. 186, s. 8.

[36]*The Municipal Act*, R.S.O. 1970, c. 284, s. 68.

It is not clear whether section 6 of *The Justices of the Peace Act* as worded at present is intended to limit the jurisdiction of justices of the peace conferred under federal and provincial law (a question which, as noted later in the chapter, is not without constitutional implications so far as it relates to a possible limitation of jurisdiction conferred under federal law), or whether it is intended merely to control the manner of its exercise. On a literal interpretation of the statute it would appear that the direction of a Provincial judge must be obtained before a justice of the peace may conduct preliminary inquiries or "show cause" hearings under the *Criminal Code*, try summary conviction offences under the *Criminal Code*, or try provincial offences other than municipal by-laws.

As a matter of practice, justices of the peace generally do not conduct preliminary inquiries or try summary conviction offences under the *Criminal Code*, but they do occasionally conduct "show cause" hearings. It is, however, common for justices of the peace to try provincial offences other than those under municipal by-laws, particularly in the larger centres. In Toronto, Ottawa and Windsor, for example, most offences under *The Highway Traffic Act*[37] are tried by justices of the peace. Whatever the meaning of the words "under the direction of the provincial judge" in section 6 of *The Justices of the Peace Act*, in practice a justice of the peace never seeks directions during the course of a trial. Wherever a "direction" is given by a Provincial judge it is usually a very informal one to start trying cases, and it is not unusual for a justice of the peace to be trying cases pursuant to a "direction" given many years previously. Clearly there is a need for some clarification of the role of justices of the peace and their relation to the Provincial judges. This we shall discuss later.

We have already noted that the structure of the Provincial Courts (Criminal Division) is a rather loose one, there being in name not one but several Provincial Courts (Criminal Division) in Ontario. We recommend that the Provincial Courts (Criminal Division) of the various counties and districts be reconstituted as a single court of record for the Province as a whole, with a branch in each of the counties and districts. This parallels our recommendations in Part I of this Report with respect to the County and District Courts.[38] This recommendation must be considered in relation to the ultimate decision with respect to the structure of the Provincial Courts (Family Division).[39] Our recommendations concerning justices of the peace and Provincial judges are contained later in the chapter.

2. *Provincial Judges*

(a) *Appointment, Background, Training*

Frequently it has been suggested that certain minimum qualifications should be required for persons appointed as Provincial judges, for example, that Provincial judges should be qualified lawyers. At the present time, however, there are still no minimum qualifications required by statute. The one exception to this is the provision in *The Provincial Courts Act*[40] which states

[37]R.S.O. 1970, c. 202.
[38]See chapter 5 thereof.
[39]See the Commission's forthcoming *Report on Family Courts.*
[40]R.S.O. 1970, c. 369, s. 9(2).

that a judge shall not exercise the powers or perform the duties conferred upon a magistrate under Part XVI of the *Criminal Code* (the trial of indictable offences) unless he is or has been a member of the bar of one of the provinces of Canada, has acted as a Provincial judge for a period of five years, or was acting as a full-time judge of the Juvenile and Family Courts immediately before December 2, 1968, and he is so designated by the Lieutenant Governor in Council.

There are at present only 15 Provincial judges in the Provincial Courts (Criminal Division) who are not legally trained. While it is true that the tendency in recent years has been to appoint only lawyers, we are nevertheless of the view that the possibility of the appointment of a non-lawyer should be removed. The necessity that Provincial judges be legally trained cannot be over-emphasized, especially in view of the complexity of some of the cases which come before them for disposition.[41]

We recommend, therefore, that the provisions of section 9(2) of *The Provincial Courts Act* be repealed and that section 2[42] be amended to restrict eligibility for future appointments to the office of Provincial judge to those persons who are or have been members of the bar of one of the provinces of Canada for at least five years.

In the past, there would appear to have been a tradition in Ontario that there be a strong political influence in the selection of magistrates. As a means of mitigating the power of political influence and reducing the risk of unfortunate appointments, the Judicial Council for Provincial Judges was established in 1968 to report to the Attorney General with respect to proposed appointments.[43] In practice the Judicial Council is consulted with respect to every appointment. Consultation is not required by statute, however,[44] and we recommend that section 2 of *The Provincial Courts Act* be further amended so as to provide as a condition precedent to the making of any appointment that the Attorney General request and receive a report from the Judicial Council.

Some of the briefs received by the Commission advocated the establishment of training programmes for persons appointed as Provincial judges, to be undertaken prior to the assumption of their duties. This idea is not new; in many continental countries there is recognition of a judicial career as such, and a person desirous of becoming a judge must undergo specialized legal training, perhaps of several years' duration. While a specific training programme for judges would not appear to be warranted at this time in Ontario, we do believe that a useful purpose would be

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[41]See the McRuer Commission Report, n. 2 *supra*, at p. 528.

[42]Section 2 provides: "The Lieutenant Governor in Council on the recommendation of the Minister may appoint such provincial judges as he considers necessary". For our recommendations concerning judges of the Family Division see our forthcoming *Report on Family Courts.*

[43]S.O. 1968, c. 103, s. 7(1), continued in R.S.O. 1970, c. 369, s. 7(1).

[44]Section 8(1) of *The Provincial Courts Act* provides: "The functions of the Judicial Council are, (a) at the request of the Minister, to consider the proposed appointments of provincial judges and make a report thereon to the Minister...".

served if a newly appointed judge were assigned by the Chief Judge for three or four months to sit as an observer in one or more courts presided over by an experienced judge, and thereby gain from the experience of the latter. An opportunity should also be given to the newly appointed judge, especially one who has had little or no experience in criminal practice, to spend time reading selected materials on criminal law and procedure prepared for this purpose.

As was indicated earlier, there are at present six part-time Provincial judges; two of these are practicing lawyers who are paid the salary of a judge, reduced *pro rata*. Four sit on a *per diem* basis. The McRuer Commission Report recommended that part-time magistrates be eliminated entirely,[45] on the basis of the impropriety of one holding a judicial office being engaged at the same time in the practice of law or any business. The Commission adopts this recommendation with respect to persons actively engaged in the practice of law sitting as Provincial judges. On the other hand, we are in favour of the *ad hoc* appointment of part-time judges on a *per diem* basis from the ranks of retired Provincial judges. Such appointments have been made recently with considerable success. The Chief Judge, in consultation with the senior judges, will usually be in the best position to make recommendations with respect to such appointments, which in our view should be conditional upon the judge in question being in sound health and not having been absent from the bench for a substantial period of time. The latter qualification is necessary in view of the rapid changes taking place in the areas of the law with which the Provincial judges must be familiar.

It is our view that the availability of judicial personnel on the foregoing basis introduces greater flexibility into the process of assigning judges. Provided that a sufficient "pool" is available, illnesses, holidays and emergencies may be covered more efficiently and economically. It would, therefore, be desirable to build up such a "pool" with representation from as many regions of the Province as possible.

(b) *Salary, Pension, Holidays*

In the McRuer Commission Report[46] it was stated that the salary structure for magistrates was quite illogical. Besides recommending a rationalization of the salary structure, the Report described the salaries as having "no relation to the importance of the office" and as being "inadequate and unrealistic". It recommended that the salary scale for magistrates be equated to that applicable to County Court judges.

The recommendations of the McRuer Commission were implemented only insofar as the salaries of Provincial judges were adjusted upwards. A new structure of categories was adopted with a three-step range of salaries for each category. The present categories and salaries (effective January 1, 1972) are as follows:[47]

[45] n. 2 *supra*, at pp. 529-30.
[46] *Ibid.* at pp. 527-29.
[47] O. Reg. 5/72.

Position	*Salary Range*		
	1.	2.	3.
1. Chief Judge of Provincial Courts	$26,000	$27,500	$29,500
2. Senior Provincial Judge	24,500	26,000	27,500
3. Provincial Judge, being a member of the bar of Ontario	23,000	24,500	26,000
4. Provincial Judge, not being a member of the bar of Ontario, who possesses at least 5 years' experience on the bench of the Provincial Courts	23,000	24,500	26,000
5. Provincial Judge, not being a member of the bar of Ontario, who possesses less than 5 years' experience on the bench of the Provincial Courts	20,000	21,500	23,000

The salaries of federally-appointed judges, which are fixed by statute, have also been recently increased. County Court judges, for example, now receive $28,000 per annum, the Chief Judge of the County and District Courts receiving $30,000 per annum, together with provincial supplements ranging from $2,000 to $5,500 per annum.[48]

There are two aspects to the question of salaries which must be considered, the first being the general level of salaries and the second being the salary structure. It is our view that the present salary levels, while more adequate than when the McRuer Commission reported, require some further upward adjustment. In view of the importance of the office of Provincial judge we are of the opinion that the present salary levels are neither commensurate with the work which must be performed by Provincial judges nor sufficient to encourage a larger number of well-qualified and experienced persons to seek the office.

We do not, however, favour adoption of the principle that the salaries of Provincial judges should be automatically equated with those of County Court judges, or indeed any other persons whose salaries are established by another government. While such other salary levels might well provide helpful comparisons, the determination of an appropriate salary level to meet the broad guidelines set out above should be the sole responsibility of the Government of Ontario.[49]

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[48]See the *Judges Act*, R.S.C. 1970, c. J-1, as amended by S.C. 1970-71-72, c. 55 (assented to on October 6, 1971). See also *The Surrogate Courts Amendment Act, 1971 (No. 2)*, S.O. 1971 (2nd Sess.), c. 16.

[49]Since the above was written, there has been some further upward adjustment in the salaries of Provincial judges. Under the revised schedule, the Chief Judge is to receive a maximum of $31,500, the senior Provincial judges a maximum of $29,500, Provincial judges who are members of the Ontario bar or who have been on the bench for at least five years a maximum of $27,850, and Provincial judges not falling in the latter category a maximum of $24,650: (O. Reg. 121/73).

With respect to the salary structure, it is our view that the salary for Provincial judges should be based solely on qualification for office, and we therefore recommend that the distinction between Provincial judges who are qualified lawyers and those who are not be eliminated. Furthermore, we see no merit in continuing the ranges of salary for Provincial judges. (The present practice is to start every Provincial judge at the first grade in his salary range. He is automatically advanced to the second range after one year and to the third after his second year.) We recommend that the salary "ranges" be eliminated.

It has already been noted that the salary levels for federally-appointed judges are fixed by statute. We recommend that the salary level for Provincial judges also be fixed by statute in accordance with the considerations discussed above. The Chief Judge would receive the highest amount, the senior Provincial judges receiving an amount between that received by the Chief Judge and that received by the other Provincial judges.

The position of Provincial judges with respect to sick leave, pensions, disability benefits and vacations is the same as that of other civil service employees. Thus the amount of time that can be taken off due to illness without loss of salary accumulates at the rate of 1.25 days per month of full attendance (*i.e.*, 15 days per year). Pensions and disability benefits are calculated on a formula based on years of service; a judge who has not contributed for at least 10 years is entitled to no pension or disability allowances whatsoever. Similarly, vacations are also based on the number of years of service; three weeks' holidays per year are allowed for the first 15 years of service and four weeks per year thereafter.

The Provincial Courts Act[50] clearly contemplates a separate scheme of benefits for Provincial judges. Section 28 thereof authorizes the Lieutenant Governor in Council to make regulations,

> (d) providing for the benefits to which judges are entitled, including,
>
> (i) leave of absence and vacations,
>
> (ii) sick leave credits and payments in respect of such credits,
>
> (iii) pension benefits for judges and their widows and surviving children, . . .

To date no regulations have been made under this power.

It is our opinion that the general civil service benefits covering sick leave, pensions, disability payments and vacations do not reflect the special considerations which ought to apply to judges. Most civil service employees spend an entire career in government employment. In contrast, the average age of appointment of judges to the Provincial Courts (Criminal Division) up to the end of 1970 was 44 years. Thus while the provisions for sick leave may well be appropriate for persons who have had a number of younger and presumably healthier years within which to accumulate a substantial amount of sick leave, they are inadequate for judges, who are

[50]R.S.O. 1970, c. 369.

far more likely to face serious illness prior to accumulating adequate sick leave in view of the age at which they are appointed. Instances have come to our attention of judges without great seniority suffering financially as a result of illness. Clearly such instances should not arise. We recommend that Provincial judges be exempt from the length of service requirements for sick leave applicable to civil servants and that there be no limitation on the number of days a judge may be absent owing to illness, such absence being properly documented. A regulation should be passed to so provide.

Similar considerations are applicable in the case of pension and disability benefits. We recommend that pension and disability benefits be provided by statute for Provincial judges and their dependants on a non-contributory basis, as they are for federally-appointed judges.[51]

The Provincial Courts Act[52] provides that, with the exception of judges appointed prior to December 2, 1968, every judge shall retire upon attaining the age of 65 years,[53] subject to reappointment "to hold office during pleasure" between the ages of 65 and 75 years. Earlier we approved the appointment of retired judges on a *per diem* basis. Under the present regulations, retirement benefits together with additional remuneration may not exceed a certain level each month. If they do, the retirement benefits are reduced by the excess. The practical result of this is that retired judges are not able to sit on a *per diem* basis for more than a specified number of days per month without loss of retirement benefits. Thus a restriction is imposed upon the use of *per diem* judges which eliminates to a large extent its very advantage, namely the degree of flexibility introduced into the process of assigning judges. We recommend therefore that the regulations laying down pension benefits for Provincial judges not contain restrictions based upon payments received for sitting on a *per diem* basis.

As is the case for sick leave, pension and disability benefits, the vacation benefits applicable to civil servants are similarly not appropriate for Provincial judges. To require a Provincial judge, who almost inevitably will have already established himself in a separate career by the time of his appointment, to wait 15 years before being entitled to more than three weeks' holidays per year is in our view unsatisfactory. We recommend that a regulation be passed setting the annual vacation for all Provincial judges at one month, so that they may be in a similar position to other judges.

Section 28 of *The Provincial Courts Act*, referred to earlier, also authorizes the Lieutenant Governor in Council to make regulations providing for a leave of absence for judges. There would appear to be a great deal to be said for some sort of periodic leave in the nature of the "sabbatical" leave available to teachers and professors. The Ouimet Report made the following observations in this connection:

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[51]See the *Judges Act*, R.S.C. 1970, c. J-1, as amended by S.C. 1970-71-72, c. 55.
[52]R.S.O. 1970, c. 369, s. 5.
[53]Section 5(3) provides that judges appointed prior to July 1, 1941 shall retire at age 75. Section 5(2) provides that judges appointed after July 1, 1941 but prior to December 2, 1968 shall retire at age 70.

> The Committee has directed its mind to the possibility that members of the judiciary might be given leave of absence on full pay periodically. . . . The Committee is of the opinion that great advantage would flow to the Bench from . . . such a scheme of sabbatical leave.[54]

We suggest that consideration be given to the granting of a period of leave every five years with full payment in addition to regular holidays, such leave only being granted on the approval of the Chief Judge of a proposed programme of study or research. This would allow Provincial judges from time to time to step back from the day-to-day operations of their courts and to view aspects of their work in a broader perspective. The experience and knowledge thereby gained by individual judges would furthermore be transmitted to fellow judges through subsequent educational seminars and ordinary daily contact.

(c) *Jurisdiction and Duties*

We set out earlier the jurisdiction and duties of the judges of the Provincial Courts (Criminal Division).[55] Subject to our recommendations in Section D of this chapter with respect to the disposition of charges for provincial offences, we envisage that the present jurisdiction of the Provincial judges to try offences and perform duties related thereto would continue unaltered. As was seen, most of this jurisdiction is conferred by the *Criminal Code* with respect to federal offences and by *The Summary Convictions Act* (incorporating parts of the *Criminal Code*) with respect to provincial offences.

It should be emphasized that not all the duties exercised by judges are exercised in court. Depending upon a variety of circumstances, a Provincial judge may have any number of the following "out of court" duties, ancillary to his main duty to try cases:

(1) daily correspondence;

(2) dealing with applications by the Crown or the accused with respect to the attendance of a probationer before the court for the variation or rescission of a probation order;

(3) the consideration and signing of bail orders, bench warrants, warrants of committal on expiry of time to pay and applications for time to pay;

(4) writing reports to the Court of Appeal on request with respect to previous convictions and/or sentence;

(5) the consideration of pre-sentence reports and psychiatric reports (which will be particularly numerous if the judge is assigned to one of the courts in which first appearances and pleas of guilty are taken); and

(6) the consideration of written submissions which may have been received in particular cases, and research on any areas of the law which may be involved in cases where judgment has been reserved.

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[54] *Report of the Canadian Committee on Corrections* 214.

[55] *Supra* Section B, 1, Structure of the Provincial Courts (Criminal Division).

In addition to having the time to perform the foregoing tasks, it is important in our view that judges have the time to keep abreast of recent developments in the law. They should also have time for regular informal discussions with fellow judges in order that they may compare practices and exchange information and ideas.

Reference was also made earlier to the carrying out by Provincial judges of various duties assigned under provincial statutes other than *The Summary Convictions Act*. There are a number of provincial statutes which assign special duties to Provincial judges. Under *The Marriage Act*[56] a Provincial judge has jurisdiction to solemnize marriage in his office. The Commission indicated in an earlier Report that there would appear to be no good reason for including the solemnization of marriage among the duties of judges.[57] We would add here the observation that the office of a criminal court judge is particularly inappropriate for the witnessing of the civil contract of marriage.[58]

Representations were made to the Commission to the effect that the duties required at present of Provincial judges under *The Master and Servant Act*[59] and *The Landlord and Tenant Act*[60] are clearly civil. It was urged upon us that the matters covered under these statutes should not be adjudicated upon in the Provincial Courts (Criminal Division).

With respect to the power of a Provincial judge (or justice of the peace) to direct the payment of wages under *The Master and Servant Act*, we agree with the representations made to us. The matters to be adjudicated upon under this statute involve the determination of the existence of a contract and, if a contract is found to exist, its interpretation. It is our view that Provincial judges and justices of the peace are not the appropriate persons to adjudicate upon these matters, and we recommend that the Act be reconsidered so that the jurisdiction granted under it may be transferred to the Small Claims Court or Small Claims Court judges.

On the other hand, it is our opinion that the adjudication contemplated under section 108 of *The Landlord and Tenant Act*[61] properly falls within the jurisdiction of Provincial judges (or justices of the peace). While it is true that civil issues have to be decided collaterally, the main duty in each case is clearly to determine whether or not a provincial offence has been committed.

We examine finally the jurisdiction given to Provincial judges by section 12 of *The Provincial Courts Act* to act as arbitrators, conciliators or members of police commissions. Section 12 provides:

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[56]R.S.O. 1970, c. 261, ss. 22(1), 26(1).

[57]*Report of the Ontario Law Reform Commission on Family Law, Part II: Marriage* 57-8 (1970).

[58]In Part I of this Report, we also recommended that the responsibility that County Court judges have for solemnizing marriages be transferred to County Court clerks. See chapter 5 thereof.

[59]R.S.O. 1970, c. 263.

[60]R.S.O. 1970, c. 236.

[61]This section makes an offence such acts as the alteration of locks during the tenancy by a landlord or tenant, wrongful repossession of the premises, etc.

> 12. (1) Subject to subsection 2, unless authorized by the Lieutenant Governor in Council, a judge shall not practice or actively engage in any business, trade or occupation but shall devote his whole time to the performance of his duties as a judge.
>
> (2) A judge, with the previous consent of the Minister, may act as arbitrator, conciliator or member of a police commission.

At the present time, 29 judges have the consent of the Attorney General to act as members of police commissions and hold appointments pursuant thereto. Six judges have the consent of the Attorney General to serve as arbitrators.

The Commission received several briefs urging that judges be required to confine themselves to the performance of judicial duties and not be allowed to sit as members of police commissions or act as arbitrators or conciliators. We concur with the observations made both in the briefs we received and elsewhere,[62] with respect to Provincial judges sitting as members of police commissions, that there ought not to be an employer-employee relationship between judicial officers and members of the police force. Judicial officers ought not, as members of police commissions, to be engaged in the legislative process. We note that recently the practice has been not to reappoint Provincial judges to police commissions. Only one Provincial judge has received such an appointment in the last three years.[63]

Similar considerations apply with respect to a Provincial judge acting as a conciliator or arbitrator. The essential elements of impartiality and independence of the judiciary may be, or may appear to be, interfered with where a Provincial judge who has acted for remuneration as a conciliator or arbitrator must subsequently try employers or employees accused of breaking the law.

We recommend therefore that section 12(2) of *The Provincial Courts Act*, which permits a judge of the Provincial Courts (Criminal Division) with the previous consent of the Attorney General to act as arbitrator, conciliator or member of a police commission, be repealed. In view of the fact that prior to the enactment of section 12(2) a general prohibition almost identical to that contained in section 12(1) was ineffectual in prohibiting judges from acting as arbitrators, conciliators or members of police commissions,[64] we further recommend that the legislation specifically prohibit Provincial judges from so acting.

3. *Justices of the Peace*

As we mentioned earlier, justices of the peace in Ontario do not operate within an organized framework. There is an urgent need to establish some order and organization for this office. At the present time, some justices of the peace are appointed for the entire Province while others are

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[62]See the McRuer Commission Report, n. 2 *supra*, at pp. 542-43.

[63]In Part I of this Report we also recommended that the provisions of *The Police Act*, R.S.O. 1970, c. 351, which make a County Court judge a statutory member of a board of commissioners of police, be repealed. See chapter 5 thereof.

[64]R.S.O. 1960, c. 226, s. 10.

appointed for particular counties and districts. Some (a small percentage) of the justices of the peace are paid on a salary basis; others are paid on a piecework or fee basis (that is, on the basis of the number of summonses or warrants, *etc.*, issued). Some justices of the peace are inactive. The exact number of justices of the peace is not known. There is an unknown number whose names are not officially recorded anywhere. Finally, the relationship of the justices of the peace to the Provincial judges and the Provincial Court system as a whole is a somewhat loose one and in urgent need of clarification.

The McRuer Commission Report dealt emphatically with the appointment of justices of the peace.[65] After due investigation that Commission discovered, on the basis of incomplete records, the names of 925 justices of the peace. The Report concluded that on the grounds of sheer inactivity alone, there were at that time (1968) over 500 justices of the peace in Ontario who should never have been appointed, or ought not to have been continued in office. Condemning the appointment, often as a political reward, of justices of the peace with no duties to perform, the Report recommended that the appointment of existing justices of the peace be cancelled and a "fresh start" made. It may be noted that since the McRuer Commission Report was published, the number of justices of the peace on record rose to 959 in 1970[66] and to 1,003 in 1971.[67]

We recommend that there be a complement of justices of the peace appointed for each of the counties and districts in Ontario. The number of justices to be appointed to each county and district should be set by regulation. Justices of the peace should not be permitted to exercise any of their powers outside the county or district to which they are appointed. The powers described earlier given to justices of the peace under the *Criminal Code* and provincial statutes should be exercised by them under the supervision and control of the local judge or judges of the Provincial Courts (Criminal Division) and the senior judge for the region. The Provincial judges would assign the justices of the peace in their county or district to sit as often as may be required to try summary conviction matters or to perform such other duties in the county as are within the powers of the justices of the peace. It is anticipated, for example, that one justice of the peace might be assigned to try certain offences while another might be assigned to conduct "show cause" hearings with respect to interim custody and release. Ultimate supervision and control over the justices of the peace would be exercised by the Chief Judge of the Provincial Courts (Criminal Division).[68]

What we envisage in the foregoing proposal is a closer control by Provincial judges over justices of the peace. It is not intended to limit the jurisdiction of justices of the peace conferred under the *Criminal Code* and other federal legislation but rather to control the manner of its exer-

[65]McRuer Commission Report, n. 2 *supra*, at pp. 513-525.

[66]*Annual Report of the Inspector of Legal Offices* 40-2 (1970).

[67]*Annual Report of the Inspector of Legal Offices* 40-2 (1971).

[68]To the extent that justices of the peace may be required to perform duties in connection with the proposed family court, they would come under the supervision and control of the judges of that court.

cise.[69] Such control as exists at present is extremely loose, despite the wording of section 6 of *The Justices of the Peace Act*, and it is not in practice exercised over all justices of the peace. Section 6 of *The Justices of the Peace Act* should be replaced by a provision requiring a justice of the peace to exercise such duties conferred upon him by federal or provincial legislation as may be assigned to him by a Provincial judge.

A further aspect of the control by Provincial judges over justices of the peace relates to the power given to Crown attorneys under *The Crown Attorneys Act*[70] to "advise justices of the peace with respect to offences against the laws in force in Ontario". As we point out in chapter 2 it is not clear whether it is intended that the Crown attorney is to advise a justice of the peace with respect to the performance of his judicial duties in specific cases or whether the Crown attorney is to be in effect a legal tutor to the justice of the peace. Both of these duties should be performed by the Provincial judges as part of their supervision over justices of the peace in their county or district.

There has been a tendency in recent years to make some appointments of justices of the peace from existing court clerical staff. Thus, for example, in a particular area where an additional justice of the peace may be required, a senior court clerk might be appointed by order-in-council to sit two mornings per week to conduct trials of provincial offences, his remaining time being spent carrying out his administrative duties. There is also a practice of giving clerical staff the opportunity of working "overtime", so that after a regular working day as a clerk, the justice of the peace may sit in night court and be paid at the rate of $20 for sittings of less than two hours and $30 for sittings of more than two hours. It is our view that no person should be allowed to sit in court after a full day's work and that any such practice should be discontinued immediately.

We recommend further that justices of the peace be appointed generally on a full-time basis. They should be required to spend their entire working time carrying out the various duties of justices of the peace (sitting to try offences, taking informations, issuing search warrants, etc.) under the supervision of the Provincial judges, and should not be allowed to engage in any other business, trade or occupation. In remote areas, however, where the appointment of full-time justices of the peace may not be warranted, suitable government officials could be appointed to act as justices of the peace on a part-time basis.

The fee system of remuneration has been a focal point of general criticism levelled against the system of appointing justices of the peace. The potential for abuse in a system which depends on justices of the peace remaining on good terms with the police in order to promote and maintain "business" is obvious. We recommend that section 8 of *The Justices of the Peace Act*, which provides for the payment of fees and allowances to

[69]It might be argued that section 6 of *The Justices of the Peace Act*, which states that a justice of the peace "shall not act" in certain cases except under the direction of a Provincial judge, limits the jurisdiction conferred under the *Criminal Code* upon justices of the peace. Any such limitation would appear to be beyond the power of the Province: *R.* v. *Isbell*, [1928] 4 D.L.R. 322, aff'd. [1929] 2 D.L.R. 732 (C.A.).

[70]R.S.O. 1970, c. 101, s. 12(h).

justices of the peace, be repealed, and that justices of the peace be paid on a salary basis only. The salary should be commensurate with the duties required of the office.

Having regard to the status of the present justices of the peace and recognizing the understandable reluctance on the part of any government to revoke appointments once made, we recommend that a provision be enacted in *The Justices of the Peace Act* prohibiting the exercise of any of the powers of a justice of the peace except by a justice of the peace receiving a salary as such. The result would be that a number of the existing justices of the peace would be able to retain their titles but would be stripped of their powers. Future appointments would be strictly on a functional basis. No doubt there are a number of conscientious and hard working justices of the peace who at present receive remuneration by way of fees alone. Such persons should be appointed to full-time positions where they are required.

The general power to appoint justices of the peace contained in subsection 1 of section 2 of *The Justices of the Peace Act* is subject to the qualification found in subsection (2). It provides that a person other than a barrister cannot be appointed unless he has been examined and certified as "qualified for the office". The examination must be performed by the judge of the County or District Court of the county or district in which the nominee resides. The judge must also certify "that in his opinion a justice of the peace is needed for the public convenience in matters pertaining to the administration of justice". We do not believe that a County Court judge is the appropriate person to make this certification.[70a] In practice, the subsection provides no realistic limitation on the appointment of justices of the peace and we recommend that it be repealed.

We recommend that a Justices of the Peace Council be established, to be composed of the Chief Judge of the Provincial Courts (Criminal Division), one additional Provincial judge, one justice of the peace and two other persons appointed by the Lieutenant Governor in Council. The functions of the proposed Council should be similar to those of the Judicial Council for Provincial Judges, namely to consider proposed appointments of justices of the peace, to report thereon to the Attorney General, to receive complaints respecting the misbehaviour of or neglect of duty by justices of the peace and to take appropriate action with respect to the investigation thereof. The Attorney General should be required to request and receive a report from the Council prior to making any appointments to the office of justice of the peace. He would be kept informed of manpower needs and resources through consultations with the Chief Judge of the Provincial Courts (Criminal Division) and the Provincial Director of Court Administration.[71]

[70a]Reference should be made to Part I, p. 172 of this Report where we make recommendations for the appointment of a body to examine all administrative or non-adjudicative duties of County Court judges with a view to making proposals for transferal to other officials or bodies where appropriate.

[71]The membership of the proposed Council may have to be modified to the extent that the functions of the Council are exercised with respect to justices of the peace who perform duties in connection with the Provincial Courts (Family Division). We make no recommendations on this matter at the present time, pending a working out of the details of the structure of the family court, to be discussed in the Commission's forthcoming *Report on Family Courts.*

In order that justices of the peace may properly discharge the judicial duties imposed upon them, we recommend that the present educational programmes for justices of the peace (consisting of annual conferences supplemented by occasional lectures) be further developed and expanded. Basic training should be given in such matters as statutory interpretation and the admissibility of evidence. Responsibility for developing such educational and training programmes should rest with the Chief Judge of the Provincial Courts (Criminal Division) as part of the general responsibility that we propose he be given for exercising supervision over the justices of the peace.

4. *The Chief Judge and Senior Judges*

One aspect of the somewhat loose structure of the Provincial Courts (Criminal Division) referred to earlier relates to the absence of a clear statement in *The Provincial Courts Act* of the functions and duties of the Chief Judge and senior judges of those courts. Section 10 of *The Provincial Courts Act* provides for the appointment of a Chief Judge, who "shall have general supervision and direction over arranging the sittings of his courts and assigning judges for hearings in his courts, as circumstances require". Under section 16, judges of the Provincial Court (Criminal Division) of each county or district may hold sittings at any place in the county or district designated by the Chief Judge. The only guidance given to the Chief Judge in the exercise of his duties is contained in section 10(4) of the Act, which provides that in the arrangement of the courts and the assignment of judges thereto, regard shall be had to the desirability of rotating the judges and the greater volume of judicial work in certain of the counties and districts. Section 28 of the Act authorizes the Lieutenant Governor in Council to make regulations prescribing the duties of the Chief Judge but to date no regulations have been passed pursuant thereto.

Section 11 of *The Provincial Courts Act* authorizes the Attorney General to designate a judge to be a senior judge of such Provincial Courts as may be named in the designation. The present designation of senior judges is on the basis of 10 regions into which the Province is divided. In two of these regions, however, no senior judge is designated at present.[72]

Our recommendations with respect to the functions and duties of the Chief Judge and senior judges are put forward within the context of the administrative structure envisaged in Part I of this Report.[73] As we stated when putting forward our recommendations with respect to that structure, the relationship of the Provincial Director of Court Administration and the Regional Directors of Court Administration with the judges will be most important. The Directors of Court Administration will be expected to develop and maintain a special relationship with the judges, and more particularly for our present purposes with the Chief Judge and senior judges of the Provincial Courts (Criminal Division). The Provincial Director would establish and maintain liaison directly with the Chief Judge and

[72]One of these is the region which includes Metropolitan Toronto. Our recommendations with respect to appointing a senior judge for this region are put forward in Section C, *infra*.

[73]As outlined in chapter 2 thereof.

the Regional Directors would have liaison with the senior Provincial judge or judges in their regions.

Many of the duties envisaged for the Provincial Director of Court Administration and the Regional Directors of Court Administration would be carried out in consultation with the Chief Judge and senior judges. One of their duties, for example, would be to exercise broad supervision and review over the administrative systems for disposing of cases in all the courts, including the Provincial Courts (Criminal Division). As we discuss in Section C of this chapter, systems have developed locally for scheduling cases and dealing with day-to-day business of the Provincial Courts (Criminal Division); these have usually developed under the authority of the local judge or senior judge and the local Provincial Court clerk. (We recommend later that the latter be referred to as an "administrative clerk".) The Directors of Court Administration, while not exercising direct control over the day-to-day scheduling of cases would, through their possession of factual and statistical information and the necessary expertise, subject systems of case scheduling to constant review and supervise their development, in consultation with the Chief Judge and the senior judges. It may be observed that the interrelationship of adjudicative and administrative functions is particularly complex in the Provincial Courts (Criminal Division) in view of the significance of the scheduling of cases on a day-to-day basis. This arises out of the large number of guilty pleas taken and the efforts expended by defence counsel to appear before the "right" judge, together with the numerous requests for remands requiring decisions by the judges based upon balancing fairness against a need to dispatch the court's business. Many such decisions involve in fact the scheduling of cases.

We now look at a different aspect of the relationship between the Directors of Court Administration and the judges. The assignment of judges being a judicial function, responsibility therefor would rest with the Chief Judge and the senior judges. In fulfilling this responsibility the judges would, however, be able to obtain assistance from the Directors of Court Administration in the form of statistical and other information developed by the latter with respect to the operation of the courts.

Having pointed out the importance of the relationship envisaged between the Directors of Court Administration and the Chief Judge and senior judges of the Provincial Courts (Criminal Division), we now examine in greater detail the role of the Chief Judge and the senior judges. As we have seen, *The Provincial Courts Act* contains relatively few provisions governing the functions and duties of these persons and no regulations have been passed pursuant to the power given to the Lieutenant Governor to prescribe the duties of the Chief Judge.

In keeping with our view that responsibilities for the operation of the court system should be clearly defined, we recommend that *The Provincial Courts Act* be amended to state more explicitly the authority and duties of the Chief Judge and senior judges. We believe that it would be preferable for such duties to be specified in the Act itself rather than in the regulations made pursuant thereto.

Among the duties envisaged for the Chief Judge would be the following:

(1) assigning Provincial judges throughout the Province and arranging sittings;

(2) exercising general supervision and control over Provincial judges (including part-time Provincial judges appointed on a *per diem* basis) and justices of the peace. (Included under this head would be the supervision of the exercise by Provincial judges of their powers with respect to assigning justices of the peace to various duties, etc.);

(3) developing and supervising educational and study programmes for Provincial judges and justices of the peace;

(4) establishing guidelines on policy matters related to practice and procedure, with a view to encouraging uniformity of judicial practice; and

(5) drawing to the attention of the Attorney General imminent retirements or resignations of Provincial judges and justices of the peace, as well as vacancies which have not been filled.

As we stated in Part I of this Report,[74] it is desirable that the Chief Justices and Chief Judges of the various courts take a regular and active part in the adjudicative processes of their courts. Some of the administrative duties outlined above will be assigned by the Chief Judge to the senior judges. We have already recommended[75] that the Chief Judge be given a highly qualified executive assistant in order that he may be further aided in the carrying out of his administrative responsibilities.

The senior judges should be required by statute to carry out within their respective regions, under the direction and supervision of the Chief Judge, such duties as may be assigned to them by the Chief Judge. We recommend that judges be designated as senior judges for a three year term, subject to reappointment, and that the Attorney General be required to consult with the Chief Judge prior to making any such appointments.

5. *Places of Sittings*

As has already been pointed out, under *The Provincial Courts Act* the Chief Judge of the Provincial Courts (Criminal Division) has general supervision and direction over arranging the sittings of his courts.[76] The Act provides furthermore that the judges of the Provincial Court (Criminal Division) of each county or district may hold sittings at any place in the county or district designated by the Chief Judge.[77]

In 1971, in the counties of Ontario (comprising basically southern Ontario), the Provincial Courts (Criminal Division) sat in 129 different

[74]At p. 29.
[75]*Ibid.*
[76]R.S.O. 1970, c. 369, s. 10(3).
[77]*Ibid.* s. 16.

cities, towns and villages. (As there are usually more than one courtroom in the larger of these cities, the number of actual courtrooms is therefore considerably in excess of this figure.) In the same year, in the districts of Ontario (comprising basically northern and northwestern Ontario) the Provincial Courts (Criminal Division) sat in 48 different cities, towns and villages.

The general practice throughout the Province, therefore, is for the Provincial Court (Criminal Division) in each county or district to sit in several different centres in that county or district, the court sitting frequently in different locations on different days. The situation in the County of Bruce is illustrative of what prevails in southern Ontario, that county being typical of most, if not all, of the counties where the court is itinerant. The court sits in four different localities as follows: in Walkerton every Monday; in Wiarton every Tuesday; in Southampton every Wednesday, and in Kincardine every Thursday. Fridays are set aside in Bruce County for special cases or overflow cases. Thus the judge, who has his office in Walkerton, must travel three times a week to the other three centres, the distance from Walkerton to Kincardine being 25 miles, from Walkerton to Wiarton 63 miles, and from Walkerton to Southampton via Kincardine 63 miles.

In the northern and northwestern parts of the Province there are special problems created by the greater distances between court locations and by transportation difficulties, especially during the winter months and the spring break-up. In the District of Thunder Bay, for example, two judges sit five days a week in Thunder Bay. A third sits in the following places: in Armstrong one Wednesday each month; in Nipigon every other Wednesday each month; in Beardmore every other Tuesday each month; in Geraldton every other Wednesday each month; in Schreiber every other Tuesday each month; in Marathon every other Tuesday each month; in Longlac every other Wednesday each month; in Manitowadge every other Tuesday each month. Some of these locations are hundreds of miles apart so that a great deal of judicial time is spent travelling from one to the other.

There have not been any major changes in the sittings of the Provincial Courts (Criminal Division) in recent years. The present organization of sittings would appear to have been determined by the accidents of history, together with some modifications introduced not by the Chief Judge but by the Ministry of the Attorney General. Many courts are still held where they were held years ago, although travel and other conditions such as relative workloads have long since changed.

We believe that there is a clear need for a reconsideration of the present organization of the sittings of the Provincial Courts (Criminal Division). As indicated in Part I of this Report,[78] one of the duties of the Provincial Director of Court Administration would be to consult on a regular basis with the Chief Judge with respect to methods of arranging sittings. In addition, the Regional Directors of Court Administration would consult with the senior Provincial judges in their regions with respect to

[78]At p. 30 ff.

providing facilities for sittings. On the basis of statistics available to the Provincial Director of Court Administration relating to such factors as the disposition of cases in various locations, developed as part of the Provincial Director's responsibility for evaluating on a continuing basis the administrative operations of the courts, the Provincial Director of Court Administration and the Regional Directors of Court Administration would be in a position to play an important role in assisting the Chief Judge with respect to reorganizing the present sittings and subjecting the organization of the sittings to constant review.

We are of the opinion that there should be some consolidation of sittings in those areas where such conditions as poor roads and inferior means of transportation no longer exist to the same degree that may have justified the original distribution of court sittings. With respect to outlying areas which are not easily accessible, while it is no doubt desirable to "carry justice" to such areas from time to time (a factor which must be considered in arranging the sittings in some of the northern districts), a problem arises in that the volume of cases does not warrant frequent sittings. A two or three day trip may be required by the judge, resulting in a major disruption in the scheduling of cases in the location where the judge ordinarily sits. In such outlying areas sittings should be scheduled more on an *ad hoc* basis as the volume of cases requires, with reliance also being placed on the use of part-time judges on a *per diem* basis where the use of full-time judges would result in a disruption in case scheduling in other areas. Justices of the peace could also be assigned small "circuits" within the county or district to deal locally with matters within their jurisdiction, thereby lessening the amount of time spent travelling by the Provincial judges.

6. *Administrative Personnel*

Section 27 of *The Provincial Courts Act*[79] provides as follows:

> 27. (1) There shall be a clerk for each provincial court (criminal division) and each provincial court (family division) who shall act under the direction and supervision of the judge.
>
> (2) Such officers, clerks and employees as are considered necessary shall be appointed for provincial courts under *The Public Service Act*.

The regulations passed pursuant to *The Provincial Courts Act* define the court clerk as "the administrator or supervising clerk of a Provincial Court".[80] We recommend that persons holding these positions at the local level be referred to as "administrative clerks", so as to distinguish them from the "Court Administrators" operating at higher levels of the administrative structure envisaged for the court system as a whole.

Thus there is a local administrator, together with such other personnel "as are considered necessary", for each Provincial Court. The local admin-

[79]R.S.O. 1970, c. 369.
[80]R.R.O. 1970, Reg. 692, s. 1(a).

istrator has authority to hire staff up to a certain level; beyond that level he may make recommendations only. Generally, the local administrator and his supporting staff act under the direction of the judges, although the degree of supervision varies greatly from court to court as do the status and duties of the local administrators and the distribution of functions between them and the other court personnel.

The functions and duties of the local administrators and their supporting staff may be summarized as follows:

(1) Bookkeeping: taking in and keeping account of monies paid into court; reconciling monies taken in against debts outstanding; arranging time payment plans; sending letters to persons who are in default with their debts; totalling dockets; preparing statistics for the Ministry of the Attorney General;

(2) Clerical: preparing and filing legal documents (charges, informations, warrants, summonses, conviction notices, notices of fine assessed, probation orders, etc.) for the court; preparing the dockets for the court each day;

(3) Judicial: performing the functions of a justice of the peace in addition to other duties where the local administrator holds that office as well; and

(4) Administrative: overseeing the running of the court to the extent authorized by the judge or judges. These duties may include carrying out a number of functions within the courtroom. In many of the smaller counties, these may all be performed by the local administrator alone, who may act as the court reporter, the clerk swearing in witnesses, the constable maintaining order, the messenger doing odd jobs for the judge, *etc.* In some centres, the local administrator has been delegated almost complete responsibility not only for the scheduling of cases but also for the assignment of judges.

Where there is a low volume of business and therefore fewer administrative responsibilities, the local administrator may be a "Clerk 4 General" with an approximate salary range of $5,500 to $6,500 per annum. On the other hand, in a large urban centre with a voluminous caseload he might be classified at a level as high as "Executive Officer 3", with a potential salary approximating $20,000 per annum.

Court personnel generally tend to work their way "up the ladder". They tend not to have high educational qualifications, their general educational background being roughly grade 10 or 11, often with a year of business college. Nevertheless, these qualifications seem generally adequate to enable them to discharge most of their duties, although we recommend that no person be appointed as administrative clerk to a centre having a population exceeding 100,000 persons who does not have qualifications at least equal to those of a person at the level of Executive Officer 1. One of the duties envisaged for the Provincial Director of Court Administration in Part I of this Report would be responsibility for the development and

administration of training programmes for administrative clerks. An elementary knowledge of the procedural provisions of the *Criminal Code*, for example, is often essential to the proper fulfilment of their duties.

We consider the position of the administrative clerk, especially in the larger centres, to be a crucial one. The satisfactory discharge of his role with respect to the scheduling of cases, for example, is an essential prerequisite to the smooth operation of the courts. The administrative clerks would report to the Regional Director of Court Administration for their particular area, and we would expect the performance of the administrative clerks to be assessed and reviewed regularly by the Regional Directors of Court Administration, who in turn would report to the Provincial Director of Court Administration.

7. *Physical Facilities*

It is clear, from observations of Provincial Court facilities conducted on our behalf, that the accommodations provided for the Provincial Courts (Criminal Division) in many parts of Ontario are unsatisfactory. Courtroom facilities, in particular, should be such as to permit the administration of justice with the degree of dignity necessary to encourage respect for the law.[81]

Included in the duties envisaged for the Provincial Director of Court Administration in Part I of this Report[82] would be a responsibility for court facilities, particularly courtrooms. Some of the shortcomings of the physical facilities for the Provincial Courts (Criminal Division) in Metropolitan Toronto are discussed later in this chapter, where we also make general recommendations with respect to the physical facilities needed for Metropolitan Toronto. The subject of court accommodations will be considered in greater detail in Part III of this Report.

8. *Role of Police Officers in the Courts*

The Commission received a number of representations including representations from the Ontario Association of Chiefs of Police criticizing the use of police officers in uniforms as court officers in various capacities in the Provincial Courts (Criminal Division). To quote from one brief which we received:

> Removal from these courts of uniformed police officers acting as "court officers" in any capacity such as court clerks, court ushers, doormen, should, with one exception, be effected forthwith. All of these duties . . . could be well conducted by a civilian staff under the administration of the court clerk. . . . All other courtroom functions . . . can be carried out by a staff of courtroom ushers and attendants. These persons could well be recruited from those who have been connected with the administration of justice during their professional career and are retired. The duties are neither heavy nor onerous nor difficult and could be very decorously carried out by retired police

[81]See also the McRuer Commission Report, n. 2 *supra*, at pp. 538-9.
[82]At p. 30.

officers and other semi-public employees. The sole function of the uniformed police officer in court, aside from being there as a witness to give evidence, should be that of guarding dangerous prisoners.

We agree that police officers should not be required to perform the duties discussed in this submission. They should be freed to perform the duties for which they have been primarily trained. Public confidence in the courts would be increased by reducing the apprehension that the courts are dominated by the police, an apprehension engendered at least in part by the integral role which appears to be played by the police in the functioning of the courts.

We recommend, therefore, that police officers be removed from their present role as court officers in the Provincial Courts (Criminal Division) and that appropriately trained civilian personnel be added to the court staff for such duties as maintaining security within the courtroom, acting as ushers, doormen, etc. Police officers should continue to be used, however, to guard dangerous prisoners. The role of police officers with respect to case scheduling and our recommendations with respect to removing them from this role are discussed later in the chapter.

The Commission has also received submissions that police officers be relieved of their responsibilities for transporting prisoners between the courts and custodial institutions. These duties disrupt the assignment of police personnel and would appear to be a waste of police skills. Under *The Department of Correctional Services Act*,[83] the superintendent of a correctional institution (a jail, reformatory, industrial farm or regional detention centre) is responsible for the custody and control of a person delivered to his institution under lawful authority for detention therein until the term of his detention is completed or until he is transferred to another correctional institution or otherwise discharged.[84] We recommend that the responsibility for transporting prisoners between such custodial institutions and the courts be clearly placed in the hands of the staff of the correctional institutions.

9. *Witnesses*

The treatment afforded persons who appear in the Provincial Courts (Criminal Division) as witnesses, especially with respect to the compensation paid to them, has been the subject of much criticism recently. For example, the Commission received a letter from a witness who had been subpoenaed to appear and who had been obliged to make four separate court appearances for this purpose. Having lost four days of pay and received the sum of $24 (representing witness fees at $6 per day) he indicated that in the future he would be both "blind and deaf" with respect to witnessing alleged offences.

The foregoing sentiments would seem to support the contention of a brief which we received as follows:

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[83]R.S.O. 1970, c. 110.
[84]*Ibid.* s. 9(2).

> The present day apathy of many members of our society in refusing to become involved, if only as witnesses, in breaches of the peace, both major and minor, is directly attributable to a considerable extent to the lack of consideration extended to them, including inadequate remuneration for financial losses suffered and inconvenience in being required to attend courts for long periods and through protracted remands.

Another brief received by the Commission put the matter this way:

> Many witnesses are persons who because of their professional calling are seriously penalized by the receipt of a subpoena. Many, for example, are independent businessmen whose sole income depends upon their ability to continue with their chosen occupation without interruption. It is felt that the present witness fee scales are not adequate . . . . [T]he legal profession receives adequate recompense for efforts made on behalf of accused prsons and persons who suffer as the result of crime also receive compensation. Surely it is high time that the system permitted the citizen not to be penalized when called to give evidence.

To the extent that the recommendations put forward in the remainder of this chapter are intended to alleviate the problem of protracted remands, their implementation should lessen some of the inconvenience suffered by witnesses. Nevertheless, it is our view that the usual fees paid to witnesses ($6 per day for appearing at the trial of indictable offences or at preliminary hearings, plus travelling expenses;[85] $4 per day in the case of summary conviction offences, plus travelling expenses[86]) are totally unrealistic. Witnesses are just as essential to the administration of justice as judges, Crown attorneys and court personnel and should be compensated adequately.

It is obviously not possible to compensate witnesses fully for their lost time. The present amounts paid, however, can result in substantial financial sacrifices for many people called to appear as witnesses. We note that the McRuer Commission Report recommended five years ago that witnesses be paid at the rate of at least $15.00 per day.[87] While not setting out a specific amount, we recommend that the daily allowances for witness fees, together with the related travel and living expenses, be increased from their present levels so as both to lessen the financial loss suffered by those required to attend as witnesses in the Provincial Courts (Criminal Division) and to reflect properly the important role of these persons in the administration of justice.

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[85]As set out in the Schedule to *The Crown Witnesses Act*, R.S.O. 1970, c. 103. This Schedule was repealed by *The Crown Witnesses Amendment Act, 1971*, S.O. 1971, c. 5, which also provides (s. 2) that witnesses shall be paid such fees and allowances as are prescribed under *The Administration of Justice Act*, R.S.O. 1970, c. 6. To the time of writing, no fees or allowances have been prescribed under *The Administration of Justice Act*.

[86]*Criminal Code*, s. 772; *The Summary Convictions Act*, R.S.O. 1970, c. 450.

[87]McRuer Commission Report, n.2 *supra*, at p. 863.

C. Administration: Criminal Offences

1. *Introduction*

Part 1 of this Report contained our recommendations respecting the administrative structure we envisage for the court system as a whole, including the Provincial Courts (Criminal Division). The structure included a Provincial Director of Court Administration, to be responsible for the overall supervision and direction of the administrative aspects of the courts. It also included Regional Directors of Court Administration for each of five or six administrative and planning regions to be established, each Regional Director reporting to the Provincial Director and having responsibility for the administration of all the courts operating in his region. Specific aspects of the relation between the foregoing persons and the Chief Judge and senior judges of the Provincial Courts (Criminal Division), which we have recommended be reconstituted as a single court of record for the whole Province, were discussed earlier in this chapter.

We turn our attention now to the actual disposition of criminal cases by the Provincial Courts (Criminal Division) at the local level. The administration of offences arising under provincial statutes is discussed in Section D of this chapter.

The *Criminal Code* sets out in detail the procedures applicable to criminal cases. However, these procedures are described essentially in terms of isolated, individual cases. Nowhere is there to be found a formal description of how the Provincial Courts are to organize and deal with the totality of those individual cases which come before them. Nevertheless, a number of procedures have developed informally. Thus there has developed the practice of having a "docket" or list of persons and corresponding charges which are to be dealt with by a particular court on a particular day. There has also developed a practice of almost never holding a trial or preliminary inquiry on the day when an accused person first appears in court.

There are sound practical reasons for most of these practices. For example, on his first appearance an accused person may still be without counsel. If he is represented, counsel may not yet have had adequate time to prepare for trial or preliminary inquiry. Therefore, a court will usually organize its work by dealing with remands or remands and guilty pleas first. These are the types of appearances that can be dealt with in relatively short periods of time. The longer trials, preliminary inquiries and some sentencing matters may be put over to another court or to another day to be dealt with by the same court. The object is to relieve those whose business with the court is short from waiting through protracted proceedings.

The combination of practices adopted by a particular court constitutes the "system" whereby that court disposes of its work. While there are many common features such as the elementary ones mentioned above, the details of these systems vary a great deal throughout Ontario in the Provincial Courts (Criminal Division).

The absence of complete uniformity is understandable and, indeed, desirable. There are great variations in conditions throughout Ontario and it would be totally unrealistic to insist that the same system in operation in a courthouse manned by five judges in an urban centre should be imposed upon a courtroom in a remote area visited by a judge for a half-day every two weeks.

Nevertheless, it is important that a number of common features exist. It is important, first of all, that there be a clearly defined system and that those appearing in the Provincial Court in any given area are aware of it. It is also important that the judiciary have a close involvement in the establishment of the system and that its supervision be in the hands of court personnel rather than the Crown attorney. Implicit in this is the requirement that the system be characterized, both in its content and administration, by those standards of fairness which are recognized by our legal tradition. Finally, it is important that the system be under constant reassessment so that adjustments can be made where necessary in order to meet new conditions.

The Commission has not made a comprehensive survey of all the systems in operation in the Provincial Courts (Criminal Division) in Ontario. Nor do we have a clear statistical picture of the degree of delay, backlog or inefficiency in every locality of the Province. However, on the basis of the limited statistics available to us, and on the basis of briefs and representations received by the Commission and inquiries and observations made on our behalf, we have not detected problems of great magnitude in the administration of criminal justice in the Provincial Courts (Criminal Division) in Ontario outside the Judicial District of York. While of course there are problems throughout the Province, the Commission is of the opinion that they can be met adequately with the relatively minor adjustments which we recommend. The problems in Metropolitan Toronto are, however, of an entirely different dimension.

Under the next heading, we examine systems of administration in Ontario generally. The objectives of these systems and their related principles are equally applicable to Metropolitan Toronto. However, the problems of volume and delay have manifested themselves in Metropolitan Toronto in their most extreme forms. We have, therefore, examined the situation in Metropolitan Toronto separately and in some detail and make specific recommendations with respect thereto. Similar problems exist in other areas in various combinations but to a lesser degree, so that at least part of the more specific analysis will be relevant to other areas. We are mindful of the following warning which was contained in a brief presented to the Commission:

> If any changes which are proposed are worked out with a view to solving the problems of Metropolitan Toronto and in the more densely populated areas, the solutions proposed may very well fail to cope with the problems in the other judicial areas and may in fact create problems in those areas which do not presently exist.

The applicability to other areas of the recommendations made with respect to Metropolitan Toronto will, therefore, have to be decided separately in each case.

The general approach adopted by the Commission with respect to the administration of the Provincial Courts (Criminal Division) outside Metropolitan Toronto is that of building on the systems which have already developed. We recommend clearer descriptions of these systems, constant review of their effectiveness and tighter control of their administration. At the same time, however, we are strongly in favour of permitting local variations to continue, so that needs peculiar to particular localities may be satisfied.

2. *Systems of Administration in Ontario Generally*

In a brief presented by the judges of one of the Provincial Courts (Criminal Division), a number of objectives were listed as being absolutely essential to the administration of criminal justice.

The first objective was to try cases as soon as possible. A number of consequences of delay were listed: memories of witnesses become stale and inaccurate; persons in custody pending trial who are subsequently acquitted or placed on probation after conviction suffer undue hardship; those putting up bail money have their funds tied up for a lengthy period of time; and finally, every unnecessary court attendance has an alienating effect upon the persons involved whether accused or witnesses.

The second objective was to set cases so that they can be tried on the half-day or day scheduled. The purpose of this is to reduce to a minimum the inconvenience to counsel, police officers and especially those members of the public who are to appear as witnesses.

A third objective was to avoid setting more cases than could reasonably be heard on a given date. Two consequences were described as flowing from the failure to achieve this objective. Either the court will be unable to complete its list and all persons involved in cases not reached will be put to the considerable inconvenience, expense and annoyance of losing that day and having to attend again at a future date or, in the alternative, in an effort to complete the list the judge will endeavour to hasten counsel and shorten the hearing, with the inevitable result that accused persons leave their trial feeling that they have not had a full and proper hearing. While the first consequence is highly regrettable and should be avoided, the second is intolerable. Any actual or apparent haste in dealing with a person charged with a criminal offence is completely incompatible with our concept of justice. The brief expressed that principle in the following way:

> We all realize that our wisdom in reaching a given verdict will often be questioned but we hope that no accused will ever question the fairness or fullness of the hearing afforded to him by the judge.

The Commission recognizes, as we have already mentioned in Part I of this Report,[88] that if the courts are to meet these objectives, they will

[88]See chapter 1 thereof.

not be able to achieve complete efficiency in terms of sitting every available hour. In other words, some "slack" must be tolerated in order to provide for the unusual situation as well as the average or regular one. Nevertheless, there can be a complete "working efficiency". It would consist of a maximum sitting time measured not only against the time available but also taking into account the minimum "slack" which must be built into the particular system to avoid the consequences described above.

While we have not made a comprehensive survey of the systems of case scheduling and case disposition in each county and district, we have become familiar with a number of them. The Commission does not consider it desirable or even possible to attempt to develop a "model" system applicable to all localities. Therefore we merely describe a number of desirable features which have been shown to work. We later make specific recommendations for the formalization, local publication and monitoring of these systems.

One system which appears to have been successful in achieving the objectives described above is the one in force in the Judicial District of Ottawa-Carleton. It might be argued that this system could not operate without the prevailing relatively high ratio of judges and court personnel to caseload. If this is the case, the ratio in other areas is too low. The system, while not an ideal, represents the type of standard for the disposition of criminal cases which we believe to be acceptable.

Judges, Crown attorneys, the court clerk[89] and defence counsel who are involved in the Ottawa system advised us that no serious administrative problems exist in the Provincial Court in Ottawa. There are seldom more than four of five remands prior to trial and usually fewer. Trial dates are set four to five weeks in advance and usually proceed on the date scheduled for trial. Criminal cases tried in the Provincial Court are usually disposed of within the 90 day goal which we recommended in Part I of this Report. There is no substantial backlog of cases.[90]

In Ottawa, the court of first appearance is described as "No. 1 Court". It starts daily at 8:30 a.m., when two justices of the peace (required under *The Liquor Control Act*[91]) dispose of overnight cases of public intoxication and disturbing the peace. This court usually ends about 9:15 a.m. At 9:30 a.m. the presiding Provincial judge commences the regular court. The court docket will usually contain the names of 40 to 60 accused persons with a rough average of two charges per person. As many as one-third of these persons will be making a first appearance as the result of an arrest or summons, or pursuant to the recent bail reform legislation.

No. 1 Court or the "remand court", as it is sometimes described, is presided over by one of five judges, each of whom always sits on the same day of the week except when ill or on annual leave. The practice is to

[89]Earlier, we recommended that the court clerk be referred to as the "administrative clerk". See the discussion under the heading "Administrative Personnel".

[90]As of January 1, 1972 there were 820 untried cases outstanding; there were 844 such cases as of June 30, 1972 and 971 as of September 30, 1972.

[91]R.S.O. 1970, c. 249, s. 102.

remand cases for multiples of seven days so that each case will continue to come before the same judge until a trial date is set. Most remands are for one week or for two weeks.

All those in custody have been seen by legal aid duty counsel prior to appearing in court. The availability of duty counsel is made known to all persons who are to appear but who are not in custody. As these cases are called, duty counsel, after arraignment (and election by the Crown where applicable), will usually advise the court:

(1) that the accused has applied for legal aid and desires an adjournment to permit his application to be approved and counsel to be selected. Such adjournments are granted as a matter of course. If bail is in issue, duty counsel is asked to resolve the question by agreement with the attending Crown attorney if possible. If agreement is not possible, the matter is set over to Monday or Thursday afternoons. All "show cause" hearings are held on either one or the other of those days and are presided over by an experienced justice of the peace;

(2) that he wishes to obtain his own lawyer and desires an adjournment for that purpose. This situation is dealt with in the same manner as (1) above; and

(3) that he has been advised of his rights and wishes to plead guilty. In this situation the plea is taken. If he considers it necessary, the judge may have the accused interviewed by a "duty probation officer", who is always assigned to No. 1 Court, and who will usually make a short report to the judge. In more serious cases, or where complications are revealed by the short report, the accused may be remanded for two weeks for a full pre-sentence report.

The remainder of the No. 1 Court list comprises cases previously adjourned either for an accused person to obtain counsel or to permit counsel to consider the advice he will give with respect to the proper plea.

When the court opens at 9:30 a.m., all counsel attending to enter guilty pleas or to set trial dates after pleas are heard at once. As a result, normally they can be free to appear in any other court at the usual opening time of 10 a.m. In this manner delay is avoided in those courts. Reasonable adjournments before pleas are granted without question.

A formal method of disclosure has been instituted by the Crown attorney in Ottawa.[91a] The technique is simply for the Crown attorney who appears in No. 1 Court in the morning to be available in his office the same afternoon. He is thus at least superficially acquainted with the case. When a formal request for disclosure has been received from counsel, he ensures that the file is received from the police and that it contains sufficient information. The object is to encourage defence counsel to make the ultimate decision with respect to plea as soon as possible rather than pleading not guilty, accepting a trial date, and then changing the plea at the last moment.

[91a] For our recommendations with respect to disclosure see chapter 2 of this Part.

In No. 1 Court, if counsel indicates that he wishes to elect for a higher court or plead not guilty, the presiding judge does not accept a formal plea or election. Rather he notes the case as "indicated" and asks the court clerk to set a date for trial or preliminary hearing as the case may be. This procedure avoids any question of the particular judge becoming seized of all contested cases on his list and assures complete flexibility on the part of the senior judge in assigning judges.

No. 1 Court is always presided over by an experienced judge with a competent justice of the peace acting as clerk. The clerk has a key role in the scheduling of cases. Although Crown and defence counsel are consulted for estimates of time to be taken as well as with respect to the number and kind of witnesses, the final estimate is made by the clerk. His experience is such that his estimates tend to be quite accurate. He has at least a two month schedule showing every open date and every case set for each court. In setting a date, the convenience of defence counsel is the prime consideration, subject to the availability of Crown witnesses as confirmed by the court officer representing the investigating police force.

Cases are set for a specific courtroom and time. Those set for a half-day or less are specifically set for 10 a.m. or 2 p.m., either alone or with other cases. This avoids having the accused, defence counsel and witnesses remaining in attendance all morning when their case is not called until the afternoon.

The court clerk keeps the master schedule and each week assigns court reporters and other personnel. He meets every Thursday with the senior judge and from the master schedule for the next week they assign a judge to each court. Every effort is made to keep each judge's caseload equitable and diversified. Each judge generally has one or two half-days in a week when he is not scheduled for a court. Where a judge scheduled to sit is freed through a last minute guilty plea, the failure of an accused to appear for his trial, or for some other reason, he will inform the court clerk, who may transfer cases from another docket which might be slightly overloaded. As a result, it is rare for a docket not to be completed.

There are a number of features of the system just described which are conducive to efficiency in scheduling and the elimination of delay. The practice of assigning judges to the remand court one day a week eliminates the tedium inherent in presiding over a remand court day after day. The system of remanding cases back before the same judge ensures greater judicial control. It also introduces some of the advantages of an individual calendaring system in terms of personal accountability of the judge.

It is apparent that the remand court is treated as a very important court in Ottawa. It is manned by experienced judges and a senior Crown attorney. The court clerk is an experienced justice of the peace. The practice of starting sharp at 9:30 a.m. allows counsel to dispose of their business in that court quickly and efficiently and to be in another court at 10 a.m. without causing delays there. The removal of "show cause" hearings to designated afternoons allows the list to be dealt with much more expedi-

tiously. Cases are seldom set down for trial prior to counsel being on record, so that further remands are seldom requested on the "proceed" date.

The system of Crown disclosure also assists in "bringing matters to a head". While the system has not yet been completely successful in having the police supply all of the necessary information at an early stage, it nevertheless represents a solid start.

Defence counsel are hesitant to plead guilty prior to learning as much as possible about the Crown's case. If the Crown attorney does not receive the information until the morning of the trial, there will be a tendency on the part of defence counsel to plead not guilty as a matter of course, with serious consideration given to a guilty plea only on the morning of trial after discussing the case with the Crown attorney. Indeed, serious preparation for trial may often take place only after this stage, so that further remands will be sought. The consequence may well be that Crown witnesses will have been present and told to return on another date.

Another feature of the Ottawa system is the prominent role of the court clerk. He participates in the assignment of judges by the senior judge and is treated with deference by the other judges. They clearly acknowledge him as the person responsible for the scheduling of cases and seem to cooperate fully with him. That type of attitude adds a great deal of flexibility to the assignment of judges and scheduling of cases.

The court clerk is also in direct control of the scheduling of cases on a day-to-day basis. He is accessible to counsel by telephone and is in a position to discuss individual cases. Thus, after a case has been scheduled to proceed, he can be informed of any compelling reasons for a further remand, the scheduled time freed for another trial and another date agreed upon (with the approval of the Crown attorney). It might be added that in practice, truly compelling reasons are required in order that a request for a remand be granted in this manner.

The type of control described above by one person over the scheduling of cases and the allocation of court personnel is extremely valuable in ensuring coordination between the various elements which constitute the system. It is obviously not possible, however, beyond a certain size of operation. In such situations there must either be a fragmenting of the central control through delegation of responsibilities or else the operation must be broken down into smaller units.

Many of the features of the system operating in the Provincial Court in the Judicial District of Ottawa-Carleton are also in effect in other localities in various combinations and together with other valuable features. In London, for example, the technique of commencing the first appearance court at 9:30 a.m. is also used. Thus lawyers there are also usually able to reach their trial court by 10 a.m. where necessary.

In Hamilton, the police have been making extensive use of appearance notices and promises to appear. Every police officer has a "court day",

roughly every third week. The appearance notice or promise to appear is always returnable on the officer's court day and allows sufficient time to permit the accused to obtain legal advice before his first appearance. When given the notice he is also handed a memorandum explaining Ontario Legal Aid and given the address of the Legal Aid Office. Meanwhile, the officer promptly prepares a "Crown Sheet" which is, in effect, a preliminary brief. It is presented to a justice of the peace on the following day for his consideration in deciding whether to confirm or cancel the appearance notice. A copy of the Crown Sheet goes to the office of the Crown attorney as well. As a result, the accused will likely have communicated with counsel prior to his first appearance. Defence counsel in turn will be able to communicate with a Crown attorney, who will be in a position to make disclosure. Thus a guilty plea can be entered on the first appearance, with sufficient evidence in the hands of the Crown attorney to enable him to speak to sentencing. From the information available to us, it would appear that the Provincial Court system in Hamilton has been operating with considerable efficiency over the last year.

The system in effect in Windsor also has a number of useful features, including the arranging of trial dates by telephone. Another is the reservation of the last Friday of each month as an "update", so that where trials must be adjourned they need not wait the usual period between the last remand and the trial date, but can be held prior to the end of the month in which the trial has been set. While there has been absolutely no suggestion of improper influence, the system is subject to the criticism that it places an assistant Crown attorney rather than the court clerk in the central role with respect to the scheduling of cases. However, direct contact between the Crown attorney and defence counsel no doubt greatly facilitates the setting of dates and, in case of disagreement, problems can be resolved in court. Trial dates are being set at present approximately eight weeks in advance.

In the County of Brant, His Honour Judge W. A. McDonald has prepared a manual to "bring together under one cover numerous memoranda and directions which have evolved over the years" regarding the procedures for the Provincial Court (Criminal Division) for the County of Brant. The manual contains the following admonition:

> Trial dates are fixed at the convenience of all parties to the action. They are usually set a month or so in advance. Matters fixed for trial will not be adjourned on the trial date unless for EXCEPTIONAL reasons. Conflict with counsel's schedule would NOT be considered an exceptional reason.

It may well be that other systems in Ontario have been reduced to writing and have not been brought to the attention of the Commission. On the other hand, many have not been reduced to writing and still consist of "numerous memoranda and directions which have evolved over the years". Indeed there are some that show little evidence of having ever been considered as complete systems. We recommend that the systems in existence for disposing of cases be formalized locally. Each locality where the Provincial Court sits should commit its system to writing. In the process of

doing this, modifications might well be introduced and the Crown attorney and defence counsel should be consulted as well as the court clerk ("administrative clerk") where his role in scheduling is significant. The description of the system should be posted at the local courthouse and distributed to members of the local bar. This process of formalizing systems of administration should start immediately.

The responsibility for reviewing and further developing systems of administration should rest with the Regional Directors of Court Administration, in consultation with the Chief Judge and the senior judges of the Provincial Courts (Criminal Division). The systems should be kept under constant review, both with respect to the quality of justice dispensed under them and with respect to their efficiency as measured by case dispositions.

The Commission realizes, of course, that the successful operation of systems of administration depends upon the quality of the personnel that must work within them and that without capable people a system will not work. On the other hand, it is obvious that capable people operating within the framework of a logical and consistent system will be able to achieve considerably more than they could in its absence. While the present problems in the scheduling of criminal cases are not great outside Metropolitan Toronto, we are of the view that substantial improvements are likely to result if our recommendations respecting the formalizing and reconsidering of systems of administration are implemented.

3. *Metropolitan Toronto*

(a) *Existing Situation*

As we indicated earlier, the problems in the administration of criminal justice in the Provincial Courts (Criminal Division) in Metropolitan Toronto are of an entirely different dimension from those arising elsewhere in the Province and cannot be adequately resolved by the relatively minor adjustments in administrative procedures which we recommended under the previous heading. The situation in Metropolitan Toronto merits separate examination.

Delay and congestion in the Ontario courts have manifested themselves in their worst forms at the level of the Provincial Courts (Criminal Division) in Metropolitan Toronto. There are regular occurrences in these courts which can only be termed disgraceful; occurrences which are more and more frequently being brought to the attention of the public. In a recent case which attracted considerable public attention, a Toronto housewife was remanded in custody for psychiatric examination before her counsel was permitted to call his client to testify on her own behalf. The presiding Provincial judge heard only the testimony of the complainants on a charge of common assault. The accused was detained in jail and was released only pursuant to an order of a higher court granting her discharge from custody.[92]

[92]Affidavits filed in Toronto Weekly Court office in support of an application for a writ of *habeas corpus* with *certiorari* in aid, and a request for the release of the prisoner. See also *The Toronto Star*, November 10, 1972 at p. 1; the reports in *The Toronto Star*, December 9, 1972 at p. 1 and December 11, 1972 at p. 8.

Numerous examples of delay and subsequent haste in disposing of cases were brought to the attention of the Commission, including instances of witnesses appearing for trial two and three times only to learn ultimately that the accused had decided to plead guilty. In one case, the accused, anxious to have his case determined, burst into tears upon being told that it would be remanded once more. In another, the mother of an accused attended at 10 a.m. when her son was scheduled to appear. At approximately 3 p.m. she left, also in tears, exclaiming that unless she returned to her work immediately she would lose her job. Nor was she able to take a second complete day off work to attend at 10 a.m. the next morning (to which time the case was remanded).

No useful purpose would be served by citing additional examples. It is sufficient to state that the Commission is of the strong opinion that the standards of justice and public service provided in these courts are far below any standards acceptable in this Province. This is not to say that incidents similar to those referred to occur in any more than a small percentage of cases. Indeed, a majority of persons are treated fairly and considerately. At the same time, however, a standard which tolerates the present frequency with which such incidents arise is far too low. We have already stressed the importance of the Provincial Courts (Criminal Division) from the point of view of the public. There are many people attending as accused persons, witnesses and friends and relatives of persons about to be tried or sentenced who are nervous and frightened. All these persons have a right to be treated with respect, if not with compassion. Furthermore, all accused persons should leave their trial feeling that they have had a full and proper hearing.

There are other consequences of delay in these courts which relate more directly to the basic aims of criminal justice. One of these aims, although clearly not the only one, is to convict the guilty. It has been suggested by Toronto Crown attorneys and defence counsel that delay offers more opportunity for acquittal apart from the merits than do most technical rules of evidence and procedure. With every additional remand there is an increased likelihood that, by the next time, a witness will have moved, died, become "fed-up" or that his memory will have faded.

There have been frequent suggestions recently that the short sitting hours of the courts are in large part responsible for the current backlog of cases.[93] It is too facile an explanation to conclude that because a judge may only sit for two hours in a particular day, more cases could be disposed of by having him sit longer. There are many other factors involved. Trials must be set in advance. For a trial, the Crown attorney, defence counsel, police and other Crown witnesses and defence witnesses must all be present at the same time. Judges in Metropolitan Toronto are often precluded from sitting because one or more of the parties involved are not present.

As will become evident from the discussion which follows, the Commission believes that the unsatisfactory situation which prevails with respect

[93]As of October 31, 1972 there were almost 10,000 untried cases outstanding at "Old City Hall".

to the trial of criminal offences in the Provincial Courts (Criminal Division) in Metropolitan Toronto, in particular at the courthouse known as "Old City Hall" (where the largest number of criminal cases are tried and the greatest number of problems occur) is the result of several factors, including the large number of cases to be tried in a single building, the nature of the physical structure in which they are tried, and the lack of sufficient personnel (judges, Crown attorneys and adequately trained court staff) combined with the absence of any central administrative coordination and control over the scheduling of cases. While the relative weight of each of these factors cannot be ascertained with certainty, it is our view that any solution to the present problems arising in the administration of criminal justice in these courts in Metropolitan Toronto must be founded upon a recognition of all these factors. At the same time, care must be taken to ensure that "efficiency" is not increased at the expense of the quality of justice administered.

We turn now to a more detailed examination of certain aspects of the administration of criminal justice in the Provincial Courts (Criminal Division) in Metropolitan Toronto. The main courthouse ("Old City Hall") is located in the downtown area. As its name suggests, it was not primarily designed as a courthouse. In addition, there are three "satellite" courts located in the communities of Newmarket, Richmond Hill and Aurora. There are also four "suburban" courts located in Scarborough, North York, Willowdale and Etobicoke. Finally, there is a courtroom at the police station on Regent Street which deals with overnight arrests for public intoxication.

One or more Provincial judges sit at each of the suburban and satellite courts except the one at Aurora which is presided over solely by a justice of the peace, as is the court on Regent Street. Expansion of the operations of these courts is not possible because of space limitations. As of November 6, 1972, for example, as a result of overcrowding at the Scarborough court, traffic accident cases were to be transferred to "Old City Hall", where a special courtroom was designated to handle them. The large volume of cases at the Willowdale courthouse has resulted in all impaired driving and related charges arising in that area likewise being transferred to "Old City Hall".

Thus by far the majority of Toronto's 25 Provincial judges of the Provincial Courts (Criminal Division) sit at "Old City Hall", where approximately two-thirds of all criminal cases in Metropolitan Toronto are dealt with. There are three outstanding features of the operation of the Provincial Courts (Criminal Division) at "Old City Hall" which account for the problems which exist at the present time. The first is the sheer volume of new criminal cases received. Over 6,000 new criminal charges are received each month, or an average of between 200 and 300 new criminal charges every working day. While several charges may be laid against one person and more than one charge may arise out of the same incident, nevertheless the task of dealing with that large number of cases daily is a mammoth one. The problems simply of getting the people to court and handling the paperwork are in themselves very great. One sig-

nificant result of the number of new charges received each day is that, taken together with the number of previous remands for which trial dates have not been set, it becomes impossible to have one central remand court. This in turn greatly reduces the degree of judicial control over the cases entering the court system.

The second feature is the pervading influence of the physical structure itself. Within the courtrooms the acoustics are bad at the best of times. In addition, the noise from outside traffic often drowns out much of what is said. Even under ideal conditions it is difficult for an accused person who is appearing for the first time, often without counsel and highly apprehensive, to understand what is happening. The lack of proper acoustics also contributes to the frequent misunderstandings which arise.

Another aspect of the physical structure at "Old City Hall" is that there are no waiting rooms for members of the public, counsel or judges. Judges must enter the courtrooms through the public doorway, possibly after coming up in an elevator with the accused or witnesses. There is nowhere to go during short adjournments. Occasionally prisoners are seen being transferred through public hallways in the custody of police officers. In the hallways police officers, accused persons, witnesses, counsel and members of the public are forced to mingle indiscriminately. The whole atmosphere can only be described as one of disorganized confusion.

The physical structure also creates complications in the establishment of a system for disposing of cases. For example, the facilities are not adequate for holding prisoners overnight. Thus each morning there is a "round-up" of persons who are brought to the holding cells in the courthouse. Since facilities do not exist for feeding the prisoners, the system of handling remands must be such that the prisoners can be returned to the jails for their mid-day meal. Thus every effort is made to have those in custody dealt with by noon. Furthermore, the "remand courts" (the main ones being Courtrooms 21 and 22) are selected for this purpose in part because they are easily accessible from the cells. To transfer prisoners from the cells to one of the other courtrooms creates additional security risks. To avoid such risks, efforts are made where possible to try those in custody in one of the "remand courts", with the result that these courts are used for both remands and trials.

The third feature of the operation of the Provincial Court (Criminal Division) at "Old City Hall" is the insufficiency of personnel and the absence of any central coordination and control over case scheduling on a day-to-day basis. There being at the present time no senior judge appointed for the region in which Toronto is situated, the Chief Judge of the Provincial Courts (Criminal Division) has been attempting to carry out the duties of both offices simultaneously. There are four judicial "vacancies" in Metropolitan Toronto, that is, appointments which have expired and which have not yet been filled. The number of Crown attorneys assigned to "Old City Hall" is clearly insufficient. Most important, however, there is no person responsible on a day-to-day basis for the supervision of the scheduling of cases. In fact, case scheduling has not been carried out by court per-

sonnel at all but mainly by police officers (who act as "court officers" and suggest a trial date when police witnesses can be available, the trial being set for that date if it is agreeable to defence counsel), and apart from occasional directives from the Chief Judge there is no central coordination of case scheduling whatsoever.

The results of this lack of adequate personnel and central administrative control, as well as of the other features of the administration of criminal justice at "Old City Hall" described earlier, are clearly evident. The backlog of cases is enormous. Trials do not proceed, and indeed are often not expected to proceed, on the dates for which they are set. (The very use of the word "peremptory" suggests that there is at least some uncertainty with respect to dates set without that condition.) Numerous remands often are granted, even after a date has been set for the trial or preliminary inquiry, partly as a result of the system of assigning judges to the main "remand courts", which does not allow for continuity between a particular judge and successive remands in a particular case. There is no clear distinction between the "remand courts" and the "trial courts", some trials being scheduled for "remand courts" and summonses and notices to appear being returnable in the "trial courts". Thus a major advantage of a "remand court", namely to separate those cases which are ready for trial from those which are not and thus to enhance the expectation that a trial or preliminary inquiry will in fact proceed on the date set, is greatly reduced. There is extensive reliance upon "overloading", or scheduling more trials than can be handled in one courtroom with the expectation that many will be adjourned without good reason. In other words, the expectation that a trial will not proceed on the date allotted is built into the system. The obtaining of delays for tactical reasons (such as for purposes of "judge-shopping"), either by the Crown or defence counsel, is thereby facilitated. Liberties are taken by counsel in the courts at "Old City Hall" as evidenced by the frequency with which counsel simply fail to appear, either because of personal scheduling conflicts or for other reasons. Finally, there arise the occurrences of delay, haste and confusion described earlier, which are both a reflection of the low priority given to the administration of justice at "Old City Hall" and a result of the factors we have discussed.

(b) *Decentralization*

It should be stressed at the outset that the features of the operation of the Provincial Court (Criminal Division) at "Old City Hall" which we have been discussing (namely the large volume of criminal cases received each day, the nature of the physical structure, and the inadequacy of the present allotment of personnel combined with the absence of central coordination and control on a day-to-day basis) are to a great extent interrelated and that no solution to the problems which exist in this court will be satisfactory unless all of the foregoing factors are taken into account. We have already pointed out that the large volume of new criminal charges which must be dealt with daily inhibits the establishment of a single remand court, which in turn reduces the possibility of central judicial control over all cases entering the system. Furthermore, even if a person were to be appointed at "Old City Hall" to be responsible for the scheduling of cases

on a day-to-day basis, the sheer volume of cases would dictate the necessity for duties to be delegated, with a consequential weakening of administrative control, greater impersonality in administration, and increased opportunities for manipulation (*e.g.*, "judge-shopping").

In the context of the existing physical structure in which the majority of criminal cases in the Provincial Courts (Criminal Division) are tried in Toronto, or a replacement of comparable size, the volume of cases received must be taken as a constant (or, as a result of population growth, as an increasing quantity). The large volume of criminal cases to be dealt with does not create problems only because of the present physical structure of the building. As we shall demonstrate, undesirable consequences inherently flow from a situation where such a large volume of cases must be accommodated by a single unit. If these consequences are to be avoided, the concept of a large centralized structure handling a necessarily huge volume of cases must be abandoned.

The Commission is of the opinion that the administration of justice in the Provincial Courts (Criminal Division) in Metropolitan Toronto should be decentralized. The daily volume of criminal cases should be broken down and dealt with by a number of separate and independent administrative systems, each located in a separate courthouse and each with an administrative clerk responsible for the scheduling of cases on a day-to-day basis. Otherwise, the sheer volume of cases inhibits the control of any administrator who may be appointed to be responsible for case scheduling. If such a person is faced with too many cases, it becomes impossible for him to maintain a high degree of personal contact with case scheduling on a day-to-day basis. More and more duties must be delegated and, with increased delegation, administrative control is weakened. More variables are introduced due to the size of the operation and greater impersonality in administration occurs. These features lead to increased opportunities for the parties to manipulate the system and, as a result, to distort it. Indeed, in such circumstances, there are not only opportunities but also pressures encouraging such manipulations. There is also greater anonymity in a large and impersonal system.

Furthermore, sheer size inhibits innovation and change in administrative techniques, since the consequences of a dislocation in one large system may be considered too great to risk. This point is particularly significant when one considers that, in terms of volume of cases, Metropolitan Toronto accounts for roughly one-half the operations of the Provincial Courts (Criminal Division) in Ontario.

There are many advantages in terms of the location of decentralized courthouses. There is, first of all, the greater convenience to members of the public simply through physical proximity. In addition, easier coordination is possible between the courts and other related services such as probation services which must operate on a regional basis. There are also less tangible benefits related to a higher degree of visibility within the community of the administration of criminal justice.

It might be argued that a drawback to decentralization is that it would cause great inconvenience to defence counsel. It could be said that for the majority of persons who must attend in court with respect to criminal cases, whether as complainants, witnesses, sureties, accused or interested spectators, it is a once-in-a-lifetime event or at least an event seldom repeated, and that any advantages accruing to these persons as a result of decentralization are more than outweighed by the inconvenience to those whose business it is to be in daily or frequent attendance. Decentralization would, no doubt, result in some inconvenience to the relatively small group that constitutes the criminal bar that concentrates its practice in the area of downtown Toronto. On the other hand, advantages will accrue to suburban law offices and criminal law practices could be expected to develop in the vicinity of decentralized courthouses. Counsel would simply have to make judgments about accepting cases in another area, just as counsel in Windsor might at present have to decide whether to accept a case to be tried in Sarnia. In any event, bearing in mind the factors discussed earlier, we do not consider the argument based upon the convenience of defence counsel to be persuasive.

We have also considered the suggestion that courthouses in Toronto be established on the basis of a division between criminal and civil cases. Under this proposal the civil cases at all levels would be dealt with in one courthouse and the criminal cases in another. While such a proposal may appear superficially attractive, we think it would aggravate the problems that exist at "Old City Hall" rather than alleviate them. We think the solution lies in decentralization.

The type of decentralization for the Provincial Courts (Criminal Division) which we envisage is a distribution of all criminal cases in Metropolitan Toronto among separate courthouses, with each operating completely independently of the others. Each would have a complete establishment of judicial, court and Crown personnel assigned on a long term basis, together with a complete range of facilities. General supervision over the administrative systems in operation in the courthouses would be exercised by the Regional Director of Court Administration with responsibility for the region, reporting to the Provincial Director of Court Administration.

It is obvious that the system of suburban courts described earlier does not represent that kind of decentralization. At present, approximately two-thirds of all criminal cases in the Provincial Courts (Criminal Division) in Metropolitan Toronto are dealt with at "Old City Hall". The remaining one-third are dealt with at five different courthouses, each with one or more Provincial judges who are assigned centrally from "Old City Hall". In fact, space limitations in these courthouses have resulted recently in certain classes of cases being assigned back to "Old City Hall".

The Commission has considered the argument that the duplication of personnel, functions, services and facilities would be inefficient and uneconomical. However, these facilities must be provided separately in the rest of Ontario. The size of the areas we have in mind for Metropolitan Toronto

would still leave them larger than any other single unit in the Province, permitting greater efficiency in the disposition of cases than exists at present and a higher degree of quality in the justice being administered.

The Commission is of the opinion that the degree of decentralization should be based upon the concept of an optimum number of cases that can be handled on a regular basis by a single unit. In this regard we have already stressed how important it is that more cases should not be dealt with than will permit close judicial and administrative control. More specifically, the volume of cases should be low enough to enable the cases to be dealt with in the first instance in one remand court and subject to personal supervision by the administrative clerk without a high degree of delegation or division of responsibility.

It is important in planning the proposed courthouses that the kind of administrative system which each structure must accommodate be kept clearly in view. It is thus possible at this stage to consider an administrative system without restrictions imposed by existing physical structures.

One feature of a proposed system of administration which should be strongly considered is the concept of a first appearance court sitting on a continuing basis. It might, for example, sit from 7 a.m. to 9 p.m. and allow the accused to appear at any time within those hours to suit his convenience. The court could be presided over by a justice of the peace and it would not be necessary for Crown or defence counsel to attend for most of the appearances. Its purpose would be to bring cases to the point where the accused either has counsel or clearly indicates that he does not want counsel and there is a clear indication as to how the accused wishes to proceed. When a case reaches this stage it could be assigned a date for the trial or preliminary inquiry or else assigned to a Provincial judge for guilty plea and sentencing.

The approach envisaged would allow more than one appearance on the same day. Thus between the first and second appearances, telephone calls or visits could be made to lawyers and duty counsel could be consulted. Disclosure might be obtained from the Crown attorney. Where a guilty plea is to be entered, an interview could be arranged with the duty probation officer so that a preliminary pre-sentence report could be prepared for the judge. Thus from the date of first appearance many matters could be disposed of or brought to the point where counsel is on record and a date for proceeding has been set. The important point is that often what is now accomplished during a two week remand could be done through an adjournment on the same day. Adequate facilities in terms of space for Crown counsel, duty counsel and probation services would have to be provided.

Adequate interviewing facilities should be provided for defence counsel together with accessible telephones which could be used in privacy. Indeed, defence counsel might want to arrange for many interviews to take place at the courthouse. Ideally, an accused person would obtain his legal aid certificate soon after his first appearance. He might telephone counsel

who could arrange an interview at the courthouse for a certain date. The accused could be advised to request a remand until that date. On that date, defence counsel might interview his client at the courthouse, obtain disclosure from the Crown attorney and appear in the assignment court at his convenience to set the date on which to proceed (perhaps agreed upon by the Crown attorney). If the guilty plea were to be entered, the matter might be transferred to the appropriate court for guilty plea and sentencing a short while later.

The foregoing example of what might happen is given merely to suggest the kinds of considerations which should be kept in mind in developing the precise system of administration which should ultimately be adopted. Another important consideration relates to the granting of legal aid certificates. We recommend that the Law Society of Upper Canada and the Government of Ontario review the existing procedures with respect to the granting of legal aid certificates with a view to ascertaining how such certificates may be obtained more expeditiously and whether, to this end, a branch of the Legal Aid Office should be situated in each of the decentralized courthouses.

Earlier, in discussing the physical structure of "Old City Hall", we referred to the inadequacy of the facilities for holding prisoners. The new courthouses should each have proper facilities for holding prisoners.

In recommending a series of decentralized courthouses for Metropolitan Toronto, we do not purport to lay down a detailed plan for the future but rather a general direction to be followed, a direction which rejects the building of a new large centralized structure to replace "Old City Hall". If a large central structure is now built with a capacity to accommodate the situation ten years from now, it is true that the structure will be underutilized for the better part of ten years. After that time, however, many of the same problems now arising at "Old City Hall" will again have to be faced, with the additional complication that the building of an even bigger centralized structure at that later date will involve tearing down the existing one or building onto it (seldom a satisfactory solution). We cannot stress too strongly our view that decentralization is inevitable and should be accepted now as the policy for the future. It has the great advantage of allowing for expansion without upsetting what has already been established.

The map in Appendix I sets out the five districts into which Metropolitan Toronto is divided for the purposes of police administration. The first five courthouses could well be located in each of the five districts. However, it may not be necessary to construct all five at once. We are of the opinion that at least three should be built as soon as possible. If each courthouse contained approximately seven courtrooms, in addition to the facilities described above, it would be close to an optimum size.

On the basis of the existing establishment of judges for Metropolitan Toronto, the foregoing proposal would result in an allocation of approximately nine judges per courthouse. That number should be adequate having

regard to the present volume of cases and the advantages of dealing with those cases in smaller units. However, these courts would be operating at close to capacity right from the start.

The percentages indicated in each of the districts on the map in Appendix I represent the number of offences in each district as a percentage of the total in 1972. These percentages correspond roughly to the charges arising in each area as a percentage of the total number of charges in Metropolitan Toronto. It might be useful, therefore, to locate the initial three courthouses in districts one, three and five. Charges arising in district two could be dealt with in the courthouse in district one and charges arising in district four could be dealt with in the courthouse in district three. The result would be a roughly equal distribution of charges. Since populations are likely to grow most quickly in districts three and four, a new courthouse would soon be needed in district four. Perhaps district two could then be divided into two parts, with one-half of its charges going to the district three courthouse and the other one-half remaining in the district one courthouse. While districts one and five are not likely to increase greatly in resident population, the "downtown" nature of the areas within them suggests that their crime rates are likely to continue to increase. As new courthouses are built in the adjoining districts, therefore, the freed capacity would be available to accommodate such increases in crime rates. Eventually, even five courthouses might prove to be inadequate. The location of additional buildings would have to be dictated by circumstances existing at such future time.

The police districts do not constitute rigid boundaries for our purposes but merely are used by way of illustration. Each contains a number of police divisions and we understand that it would not cause great problems in terms of police administration to cut across the "regional" boundaries, provided that the divisions were left intact.

We realize, of course, that courthouses cannot be built overnight and that a certain amount of time will be required before our recommendations with respect to decentralization can be fully implemented. There is no reason, however, why buildings cannot be leased to serve as courthouses until such time as courthouses can be built. (In fact, "Old City Hall" is currently leased.) We also realize that more precise statistical information is required in order to determine the optimum number, size and location of courthouses and our comments with respect thereto are made as broad suggestions rather than as specific recommendations. We are firm in our view, however, that the concept of decentralization must be introduced as soon as possible into the planning of future accommodations for the Provincial Courts (Criminal Division) in Metropolitan Toronto. The decentralized system recommended is similar in principle to that which has been operating satisfactorily in London, England for many years.

The foregoing recommendations, if implemented, would result in a basic change in the structure of the administration of criminal justice in Metropolitan Toronto. However, there is also much that can and should be done immediately with respect to the strengthening of the control of the

scheduling of cases at "Old City Hall", and it is to this matter and related matters that we now turn our attention. Our recommendations with respect thereto should not, however, be taken to represent a complete or ultimate solution to the problems which exist in the Provincial Courts (Criminal Division) in Metropolitan Toronto.

(c) *Personnel*

As indicated earlier, one of the features of the operation of the Provincial Court (Criminal Division) at "Old City Hall" is the insufficiency of personnel and the absence of any central coordination and control of case scheduling on a day-to-day basis. There is no senior judge appointed at present for the region in which Metropolitan Toronto is situated and the Chief Judge has had to assume the duties of the senior judge, including the assignment of judges on a day-to-day basis. In this he is assisted by a senior justice of the peace, who has been informally designated as the Chief Judge's "executive assistant". The dual responsibilities imposed upon the Chief Judge permit little more than a "patchwork" approach to case scheduling at "Old City Hall". As Chief Judge, he must spend considerable time outside Toronto, providing direction and leadership to all judges of the Provincial Courts (Criminal Division) with respect to practice and recent changes in the law. The responsibility of the senior judge for the region which includes Metropolitan Toronto is a large one, requiring the close attention of a single person on a day-to-day basis without the distraction of those other administrative responsibilities which must be borne by the Chief Judge. We recommend that a senior judge be appointed immediately for this region.

Furthermore, while there is at the present time a court administrator at "Old City Hall", he has no involvement at all in the day-to-day scheduling of cases, his time being spent supervising all the administrative personnel of the Provincial Courts (Criminal Division) for the Judicial District of York. In 1971 the total caseload in this district exceeded the entire caseload of the rest of the Province. A large percentage of this caseload involved traffic matters under *The Highway Traffic Act* and municipal by-laws. The task of supervising the collection of fines and issuing, serving and keeping track of documents is a massive one and clearly a man of high calibre is required to perform it. However, there remains no person responsible on a day-to-day basis for the supervision of the scheduling of cases, and as has already been pointed out, this void has been filled by police officers. We recommend that an "administrative clerk" be appointed immediately at "Old City Hall" to be responsible for the day-to-day scheduling of cases. He should be provided with adequate office space and support staff and should be accessible to the Crown and defence counsel, both personally and by telephone. Police officers should be completely phased out of their present role with respect to case scheduling. (The role of police officers acting as "court officers" in other capacities has already been discussed.)

We believe that the designation of a senior judge for the Metropolitan Toronto region together with the appointment of an administrative clerk responsible for the scheduling of cases would result in considerable im-

provement in the present conditions at "Old City Hall" subject, however, to the qualifications expressed earlier with respect to the inherent problems posed by the large volume of cases and the physical structure itself.

In addition to the vacancy in the office of senior judge, there are, as we have said before, four judicial "vacancies" (appointments which have expired and which have not yet been filled) in Metropolitan Toronto. We recommend that these four vacancies be filled immediately. We note that despite the existence of these vacancies in Metropolitan Toronto, Toronto judges are frequently sent to various parts of the Province to substitute for judges who have become ill. We strongly disapprove of the practice of drawing upon the regular establishment of judges in Metropolitan Toronto to meet the needs of other areas. These needs could be met at least in part by the appointment of part-time judges from the ranks of retired Provincial judges, recommended earlier.

Additional courts cannot operate unless Crown attorneys are available as well. At the present time, Crown attorneys are assigned to "Old City Hall" on the basis of one per operating courtroom, permitting no flexibility unless one happens to finish early in his courtroom. We recommend that four extra Crown attorneys be assigned immediately to "Old City Hall".

(d) *Disposition of Cases*

As stated earlier, the sheer volume of cases prohibits the establishment of one remand court at "Old City Hall". There are, therefore, a number of courts of first appearance, the main ones being courtrooms 21 and 22. The division of input into these courts is based upon the police division in which the alleged offence took place. Thus, charges arising in police divisions 11, 52, 55 and 56 are brought to courtroom 21 and those arising in police divisions 14, 51, 53 and 54 are brought to courtroom 22. When a trial date is set, it is set for a corresponding trial court. Trials, the dates for which have been set in courtroom 21 are normally conducted in courtroom 34, and those dates set in courtroom 22 are conducted in courtroom 32. As mentioned earlier, however, if the accused is in custody his case will likely remain for trial in the remand court; in addition, summonses are now being made returnable in courtrooms 32 and 34 for 2 p.m. (as is also the case for appearance notices, promises to appear and recognizances to appear).

Not all first appearances are in courtrooms 21 and 22. There is a separate court of first appearance for female offenders (courtroom 28). This separate remand court arises out of the need for separate holding facilities for female prisoners. Males charged with assault and morals charges against women also appear there. Trials set in courtroom 28 are conducted in courtroom 33, although trials also take place in courtroom 28 and summonses are also returnable in courtroom 33. Courtroom 25 is the court of first appearance for persons charged with drug offences. This separation is largely based upon the fact that these cases are prosecuted by a federal agent rather than through the Crown attorney's office. Some of these trials are conducted in courtroom 27 but some are conducted in the

court of first appearance. Courtrooms 26 and 35 are used in a similar way for impaired driving and related offences. Courtroom 43 is used for other criminal driving offences. Courtroom 24 is used for all charges arising out of *The Liquor Control Act*[94] and *The Liquor Licence Act*.[95] Other courtrooms are designated for "special proceeds" (involved cases which are likely to take a lengthy period of time) and *ad hoc* for use when required and when an extra Crown attorney and judge are available.

At the present time, judges are assigned on a monthly basis to particular courtrooms. Each month a "starting list" is prepared, listing each of the courtrooms in "Old City Hall", as well as those in the "suburban" and "satellite" courts, and designating one judge for each of them. Thus the judge assigned to courtroom 32 will sit there every working day of the month and hear nothing but trials assigned from courtroom 22. A judge assigned to courtroom 26 will hear impaired driving and related offences every day for a month. Courtrooms 21 and 22 are considered to be particularly heavy assignments. Sitting in the first appearance courts has been described by the Chief Judge as "a very exhausting experience". He tries to arrange for a one month assignment to one of these courts to be followed by an assignment to a court where the pressure of the list is not as great.

The monthly list is only the starting point in the assignment of judges. Adjustments are required on a day-to-day basis. For example, there are special cases which may take lengthy periods of time. If a judge has heard part of the evidence in a case that has had to be adjourned and the judge has been assigned meanwhile to another courtroom, it will be necessary for that case and the judge to be brought together on the date set for completion of the trial. Adjustments also have to be made if a judge falls ill.

Reference has already been made to one of the main problems at "Old City Hall", namely that trials do not proceed on the dates for which they are set and numerous remands are often granted. In addition, there is a firm expectation among all parties concerned that trials will not proceed on the date allotted. The main purpose of a remand court is to separate those cases which are ready to proceed from those which are not and thereby to enhance the expectation that a trial or preliminary inquiry will in fact proceed on the date set. The effectiveness of the remand courts has been reduced to the extent that the distinction between the remand courts and the trial courts has become blurred.

We recommend, therefore, that an attempt be made to demarcate more clearly the remand courts from the trial courts at "Old City Hall". To this end, it might be possible to rearrange the designation of courtrooms and the assignment of certain kinds of cases. For example, a separate court for impaired driving cases seems to have been largely the result of the frequent appearances in such cases of breathalizer operators, it being thought desirable to enable them all to appear in the same courtroom. With the increased use of the certificate in proving alcohol-blood ratios, however, there may no longer be any reason to separate these cases. The

[94]R.S.O. 1970, c. 249.
[95]R.S.O. 1970, c. 250.

assignment to the trial courts of first appearances pursuant to summonses results in part from a need to fill in vacant afternoons. These often arise because cases scheduled for a particular day are disposed of in the morning due to a large number of remands. The extent to which the physical plant and the sheer volume of cases at "Old City Hall" inhibit and, indeed, prevent the establishment of a central remand court has already been pointed out. However, efforts should be made not to detract any more than is absolutely necessary from the principle that appearances for the purpose of remands should be separated from appearances for the purpose of proceeding. Remand courts should not be used for trials and trial courts should not be used for first appearances.

Extensive reliance upon "overloading" also detracts from the expectation that a case will be proceeded with once a trial date has been set. When a particular courtroom can handle six trials of impaired driving in one day and fourteen trials are scheduled with the clear expectation that many will be adjourned, the system builds in an expectation that trials may be adjourned without good reason. In order to accommodate every trial that is set and to make it clear that trials are expected to proceed on the date set, trials taking less than a full day should not all be set for 10 a.m. but for 10 a.m. and 2 p.m. If a trial is to take less than a half-day so that two or more trials are scheduled for one half-day, they should be scheduled by the hour. For the disposition of impaired driving charges, for example, it might be possible to schedule two cases for 10 a.m. and one for 11:30 a.m. Similarly, two could be scheduled for 2 p.m. and one for 3:30 p.m. Such a system of case scheduling should, in the long run, result in a greatly improved utilization of judicial time.

In order to establish the "expectation" referred to above, a case should not leave the remand courts until it is in fact ready to proceed. In most cases, this will mean that the accused will be represented by counsel who will agree to the trial date. At first it will be necessary to impress upon counsel that he has been given a specific time for a trial date and that he is expected to proceed on that date. He should be told that if for any reason it will be impossible for him to proceed as scheduled he must inform the administrative clerk (once he is appointed, established and accessible) so that another trial can be scheduled for the time allotted. The duty of counsel is discussed at greater length below.

Quite apart from the fact that delay resulting from numerous remands often works to the advantage of the defence, there are often specific reasons why delays might be sought for tactical reasons, either by the Crown or defence counsel. It is, therefore, necessary that the judiciary be in a position to limit excessive remands, and the system of administration within which a judge is operating should support and encourage him in the exercise of this function. The key role in eliminating excessive remands must fall to the individual judge in the particular case. Circumstances vary so greatly that it is not possible to lay down precise rules as to when remands should or should not be granted. Nor is it possible to suggest a maximum number of remands for all cases. It is clear, however, that remands cannot be granted whenever the accused, counsel or Crown counsel requests them. Otherwise

trials would never proceed. There will occasionally be emergency situations such as illness or death which will necessitate delay. On the other hand, there may be conscious efforts to delay, or liberties taken with the court simply for the convenience of counsel. It is obvious that there must be some balancing of the accommodation of the accused and the due administration of justice.

The Ontario Court of Appeal has considered the problem of remands in a number of recent decisions. In some of these, it has quashed convictions where the accused has been tried in the absence of counsel. In others which have been brought to the attention of the Commission, the court has apparently upheld convictions in trials in which the accused was not represented by counsel. Unfortunately, reasons do not appear to have been given in the latter group of cases. The decisions in which reasons were given are discussed later. However, it can be said generally that in these cases the Court of Appeal has stressed the importance of "the appearance that justice has been done". It is, therefore, important not only that the accused be given ample opportunity to retain counsel and prepare for trial, but also that this opportunity be apparent. This is a right, however, which should not be abused for the purpose of delay or frustrating the course of justice.

Thus, prior to forcing a case on to trial, there should exist a train of events clearly establishing the appearance that justice has been done. Every case which comes before the remand court should be treated with a view to developing such a train of events. At some stage, the judge will have to make a decision that the accused has received fair and adequate opportunities to prepare for trial and that it is apparent that justice has been done.

In order for a judge to make a decision that a trial be forced to proceed, however, it is necessary that he have a knowledge of the past history of the case. In other words, it is desirable that there be some continuity between a particular judge and successive remands in a particular case. Under the existing system of assigning judges at "Old City Hall", that continuity is difficult to achieve. At present, the presiding judges in the main remand courts (as in the other courts) sit there for only one month at a time. Thus the presiding judge will often not see a particular case through more than two remands. When a case is remanded to the next month, it comes before a different judge. Reasons for remands are seldom recorded by the judge or court personnel. Thus it will be more difficult for the presiding judge to decide that a trial should be scheduled with a view that it be held even if the accused requests a further remand on the trial date.

The system of assigning judges to the main remand courts should be modified to allow greater continuity. We recommend that judges be assigned to these courtrooms on a one-day-per-week basis rather than for five days per week for one month at a time. For example, a particular judge would be assigned to courtroom 21 every Monday for a year or even longer. On the other days of the week he would be assigned either to other courtrooms, preferably on the same basis, or be given time in his office to carry

out his other duties. We recommend in addition that the practice be adopted of remanding cases for periods of seven days or multiples of seven days.

The continuity over particular cases resulting from the foregoing recommendations should make it easier to decide whether or not the reasons given by an accused or by his counsel in requesting further adjournments are genuine. When 10 and 12 adjournments prior to trial or preliminary inquiry have come to be fairly commonplace, it is difficult to deny that closer judicial control of this nature is necessary. The method suggested for assigning judges also has the advantage of eliminating the tedium and pressure of sitting in the main remand courts day after day for a month. In addition, it provides an incentive to the individual judge to bring cases to a point of finality by allowing him to keep track of individual cases. In other words, it introduces an element of accountability which seems to have been instrumental in the success of the individual calendaring systems adopted recently in parts of the United States. Judges seem to acquire a personal rather than an impersonal responsibility with respect to particular cases, which manifests itself in ways which ultimately result in a speedier disposition of cases.

For similar reasons, the same method of assignment should be applied to the other courts as well. It would be preferable, for example, for a judge to hear impaired driving cases one day per week for six months than for him to sit in the same courtroom hearing the same kinds of cases day after day for a solid month. Furthermore, some flexibility is thereby introduced. For example, it might be found that a particular "specialty" court need only sit four days per week or that an extra day need be added each week. The system of assignment which has been proposed could more easily accommodate such variations.

There are, generally, two stages through which a case must proceed before it is ready for disposition. The first stage involves the obtaining of counsel for an accused person who appears without counsel, or a clear indication from the accused that he wishes to proceed without counsel. The second stage occurs once counsel has been retained. At this point the trial or preliminary inquiry must be set for such future date as will allow counsel time to prepare his case. In addition, he must be present and ready to proceed on the date set for the trial or preliminary inquiry.

With respect to the first stage, the Commission has received a number of submissions to the effect that many accused persons are obtaining unnecessary remands by using the excuse that they have not had an opportunity to obtain counsel. It is said that with more liberal bail provisions most accused persons have little interest in proceeding to trial. There have also been suggestions that delay in obtaining a legal aid certificate has been a major excuse used by these persons.

In *R.* v. *Hoare*[96] the Ontario Court of Appeal quashed the conviction of a seventeen-year-old boy on a charge of exposing obscene writing to public view. The accused was apprehended while selling newspapers on

[96][1970] 2 O.R. 165.

a city street. He was kept in custody over the weekend and brought to court on Monday. He was asked if he was ready to proceed and, upon his indication that he was, he was tried and convicted without counsel. Aylesworth J.A., delivering the judgment of the Court of Appeal, said:[97]

> We think the learned Provincial judge, acting as Magistrate, in all the circumstances with which he was confronted, should have either strongly urged the accused to obtain counsel or should have adjourned the hearing with instructions to the Crown actually to get in touch with the accused person's parents; that is to say, should have taken some measure to see that, as far as he possibly could, arrangements were made to make it probable for the accused's defence to be put as fully as it could be put in the circumstances.

The court concluded that on all of the facts there was not the ordinary appearance of justice and quashed the conviction.

Mr. Justice Aylesworth also delivered the judgment of the Court of Appeal in another decision quashing a conviction for similar reasons. In *R.* v. *Patterson*,[98] he stated as follows:

> The facts are very simple. The appellant who, so far as the record is concerned, had no previous Court experience — certainly there is no evidence of any previous record of convictions against him — after two remands of the charge, was compelled to proceed with his trial without counsel. It is true a date for trial, namely October 27, 1971, had been fixed on the occasion of a previous remand in September. The appellant never had any counsel in those proceedings. He attempted on the day before the day fixed for trial to secure the services of the counsel who appeared for him in this Court, but was then informed on that day by that counsel that he, the counsel, was not free to take the case the following day and could not act accordingly. On the return date of the trial the following day the accused stated he was not ready for trial because he was without counsel.
>
> The learned Provincial Judge, who has much experience in these matters, decided that the trial must proceed nevertheless, and the trial was held accordingly and the appellant convicted. With respect, we think, in the particular circumstances relevant to this case, the Provincial Judge was wrong and we think he exercised his discretion wrongly on the subject.

A similar result was reached in yet another case.[99]

We are of the opinion that the decisions referred to above do not in any way detract from the power of a Provincial judge to deny further remands and to insist upon proceeding in a proper case. There is nothing in any of the decisions to suggest that they were cases involving undue delay. In the *Hoare* case, for example, the accused was appearing for the

[97] *Ibid.* at p. 166.
[98] Unreported, appeal argued March 7, 1972.
[99] *R.* v. *Tantardini*, unreported, appeal argued February 3, 1971.

first time. In the *Patterson* case, there had been two remands. Nor was there any suggestion of any undue delay on the part of the accused, either by design or through laxity, in the third case mentioned above.

What the decisions do indicate, however, is that certain steps should be followed before a case is forced on to trial. In each case the accused should be told of his right to counsel. Beyond the first remand or two the accused should be explicitly warned of the consequences of not being represented by counsel at his next appearance. Where the judge is of the opinion that the accused is not sincere in his efforts to obtain counsel, the accused should be so informed. The accused should also be advised that the trial date is being set, for example, four weeks in advance, and that if he arranges for counsel immediately and informs his counsel that a trial date has been set, he will be able to be represented. In addition, he should be told explicitly that if he waits until shortly before the trial date to obtain a lawyer the court will not accept as an excuse for a further remand that counsel has not had time to prepare. Finally, while it is true that duty counsel can and should warn an unrepresented accused person of the consequences of not being represented by counsel at his next appearance, it is also important that such warnings be stated for the record and, therefore, by the court.

Where a trial date has been set for an accused person in the manner outlined above, the proceedings should be recorded by the court reporter and a transcript made available to the trial judge as required. The trial judge will then be in a position to make a judicial decision. If a proper train of events has been set by the judge in the remand court to ensure the appearance of justice, the trial judge should have no hesitation in proceeding. He should, however, state for the record the factors which have led him to the conclusion that the trial must proceed in spite of a request by or on behalf of the accused for a further remand. Where a trial judge exercises his discretion judicially in refusing to postpone a trial in that he directs his mind to the proper question, does not take into account extraneous considerations and acts in good faith and without bias, his decision is not reviewable on appeal.[100]

Delay in obtaining a legal aid certificate is often stated as a reason for requesting further remands. Ordinarily, applications for certificates take approximately two weeks to process, so that a three week remand will often be necessary. Furthermore, the accused might not submit his application until the day before his next court appearance, with the result that a further remand will be necessary. There is, therefore, often a pattern of three or four appearances prior to retaining counsel. We have already made reference to the need for a review of the existing situation with respect to the granting of legal aid certificates.[101] Consideration might also be given to the adoption of a technique similar to that used in Hamilton, whereby an accused who is required to appear in court by summons, appearance notice, promise to appear or recognizance is given a memorandum in addition to the summons or other document, setting out the address and phone number of the nearest Legal Aid Office.

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[100] *Darville* v. *R.* (1956), 116 C.C.C. 113.

[101] *Supra* at p. 45.

Problems of delay do not end once counsel have been retained. We are of the view that counsel take far too many liberties in the Provincial Courts (Criminal Division), by frequently failing to appear as scheduled. To cite but one of several similar instances which have come to our attention, on one day recently nine cases were fixed for trial at 10 a.m. at "Old City Hall" and at 10:15 a.m. none proceeded. In at least four of these cases, lawyers were on the record and failed to appear. Instances have come to our attention of defence counsel setting trials at "Old City Hall" and at one of the suburban courts for the same morning, necessitating an adjournment either at "Old City Hall" or at the suburban court. Some lawyers regularly use delay as a defence tactic in itself, a practice which would appear to be inconsistent with counsel's duty to the court as laid down in the Canons of Legal Ethics, which require counsel's conduct to be characterized at all times by candour, fairness, courtesy and respect.[102]

One reason frequently given for counsel not appearing as scheduled is the occurrence of court conflicts with respect to counsel's personal schedule. Often counsel will schedule a number of matters at "Old City Hall" for the same morning in order to maximize efficiency in his own scheduling. Such a practice creates havoc for the courts. One technique that would assist in reducing conflicts would be to commence the remand courts one-half hour prior to the regular court times. This would permit counsel to attend to his appearances in the remand courts from 9:30 a.m. to 10 a.m. and from 1:30 p.m. to 2 p.m. He would then be in a position to proceed with any trials or preliminary inquiries scheduled for 10 a.m. or 2 p.m. in other courtrooms. We discuss conflicting court appearances later.

Where an accused is not represented by counsel, not through his own misconduct but through that of counsel, the Ontario Court of Appeal has held that the accused may not be forced on to trial.[103] The position taken by the Ontario Court of Appeal may be contrasted with that taken by the Court of Appeal in England, which has held that an accused person may be forced on to trial where he is unrepresented solely through the fault of his counsel.[104] While the Ontario position is in our view preferable, it does invite serious disruptions to case scheduling unless counsel can be discouraged from not appearing at trial. To this end, a sanction is clearly necessary.

There may be some question as to whether or not a Provincial judge has the power to convict counsel for contempt of court as a result of his failure to appear for a trial on a date to which he has consented. Section 9(1) of the *Criminal Code* provides:

> Where a court, judge, justice or magistrate summarily convicts a person for a contempt of court committed in the face of the court and imposes punishment in respect thereof, that person may appeal against the punishment imposed.

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[102]The Law Society of Upper Canada, *Professional Conduct Handbook*, Ruling 1 (Canons of Ethics), Canon 2.

[103]*R.* v. *Murphy*, unreported, argued January 22, 1970; *R.* v. *Duguay*, unreported, argued November 1, 1971.

[104]*R.* v. *Kingston*, 32 Crim. App. Rep. 183.

In *McKeown* v. *The Queen*,[105] the Supreme Court of Canada upheld a contempt conviction by a County Court judge against a barrister who failed to appear at a trial, holding that the contempt in question was one committed "in the face of the court". On the basis of the majority decision in this case it would appear that a Provincial judge has power to cite counsel for contempt of court in proper cases where he has failed to appear on the date set for trial. It may be pointed out that the effect that the provisions of section 440 of the *Criminal Code* may have on the power of judges to commit summarily for contempt was not argued or considered in either the majority judgment or the minority judgments. The section reads as follows:

> Every judge or magistrate has the same power and authority to preserve order in a court over which he presides as may be exercised by the superior court of criminal jurisdiction of the province during the sittings thereof.

Whatever may be the application of the *McKeown* case to the subject we are here discussing, we think that resort to the criminal law for the purpose of regulating the attendance of counsel in the court is not the best procedure. We think the matter can best be resolved by treating it as one concerning the duties of counsel to his client. In our opinion, the interests of justice can best be served by an amendment to *The Law Society Act*[106] making it an offence punishable on summary conviction for counsel properly retained to fail without lawful excuse to appear on behalf of his clients as and when a case has been set for trial. In any case counsel who fails to appear should be reported to the Law Society of Upper Canada for possible disciplinary action.[107]

No doubt there will be situations where counsel simply cannot proceed because of sickness or accident. Such reasons would constitute lawful excuse. However, conflicting court appearances scheduled beforehand should not. On the other hand, there might well be circumstances in which counsel may be engaged in a trial in another court which is unexpectedly prolonged. Such situations are inevitable, just as it will be inevitable that adjournments will have to be sought in other courts due to unexpected prolongation of trials in the Provincial Courts (Criminal Division). In such circumstances the duty of counsel should be to communicate with the administrative clerk and Crown counsel at the first opportunity so that all interested parties, including the judge, might be so advised.

The Law Society of Upper Canada has laid down the principles which should govern the right of counsel to withdraw from a criminal case prior to its commencement. These are contained in Appendix II and further discussed in Part III of this Report. The continuity that we have recommended between individual judges and successive remands in particular cases should assist somewhat in providing closer supervision of cases. A trial judge would appear to have the power to force on a trial where a last

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[105](1971), 16 D.L.R. (3d) 390.

[106]R.S.O. 1970, c. 238.

[107]The role of counsel and our recommendations with respect thereto are discussed at greater length in Part III of this Report.

minute adjournment is sought on the basis that the accused wishes to discharge counsel and retain new counsel, the accused's right at this stage being not to retain new counsel but merely to proceed with the trial and conduct his own defence.[108]

We have been considering the problem of trials and preliminary inquiries not proceeding on the dates set primarily with reference to defence counsel. It also occurs frequently, however, that the Crown is not ready to proceed. Witnesses might not be present or the Crown attorney might wish to have further time to prepare his case. We are of the view that trial judges should take the same strict attitude with the Crown attorney as they should with defence counsel. The Crown should be ready to proceed at the time and on the date scheduled. Where no valid reason exists for postponing the trial, the prosecution should be required to proceed even if that means it will have no evidence to adduce and the accused will be acquitted. Where a Crown witness fails to appear, a postponement of the trial should be granted at the request of the Crown attorney only where that witness has been properly subpoenaed.

The practice has arisen recently in Toronto of serving subpoenas on witnesses in criminal cases by mail. The procedure obviously saves a great deal of time on the part of police officers. On the other hand, it is clearly not authorized by the *Criminal Code*, which requires a subpoena to be delivered personally by a peace officer to the person to whom it is directed or, if that person cannot conveniently be found, left for him at his last or usual place of abode with some inmate thereof who appears to be at least 16 years of age.[109] The end result is that a prospective witness in a criminal case who has been served with a subpoena by mail is under no obligation to obey it. This may present very real problems in the administration of the courts in the future. It should receive the close scrutiny of the court administrators for the purpose of ascertaining what changes, if any, may be required in the law.

The fact that different judges have different attitudes toward sentencing is frequently a factor contributing to the seeking of remands. There is a considerable degree of uniformity with respect to the type of sentence given in certain cases among many judges. Other judges, however, have reputations of being harder on certain types of offenders than on others. As a result, a considerable amount of time is often expended by counsel in manoeuvring to come before certain judges and to avoid others. Examples have been brought to the attention of the Commission where defence counsel simply refuse to proceed before certain judges. When a trial has been scheduled and a certain judge happens to be sitting on that date, almost any excuse will be put forward to have the case remanded once more, in the hope of subsequently coming before a judge who is more acceptable in the eyes of counsel. The practice of judge shopping has a debilitating effect upon attitudes towards the judicial process and is a significant factor in increasing the number of remands and, therefore, delays in the ultimate disposition of cases. The system of scheduling cases

[108] *Spataro* v. *The Queen* (1972), 7 C.C.C. (2d) 1 (S.C.C.).
[109] *Criminal Code*, ss. 629, 455.5(2).

and assigning judges should be established in a manner that will discourage counsel from seeking remands in order to avoid a particular judge.[110]

Another underlying motive for seeking remands on behalf of the accused is the desire of defence counsel to obtain maximum disclosure of the Crown's case prior to trial. Most counsel consider it their duty, prior to advising a guilty plea, to learn as much as possible about the amount and kind of evidence the Crown has. This is entirely justifiable and, indeed, necessary if proper advice is to be given. In spite of the importance of this stage of the criminal process however, there is no established system for obtaining such disclosure. At the present time it depends entirely upon informal contacts between defence counsel and the Crown attorney.

The guilty plea is an important aspect of a smoothly operating system of administration, simply because the disposition of a case pursuant to such a plea is much more expeditious than disposition by trial. Crown witnesses usually need not be called, the facts are often agreed upon and the whole matter usually takes a fraction of the time of a trial. It is thus an inefficient use of resources for trials to be held in cases where guilt can easily be proven and that is known by all parties beforehand. Of course, the decision to plead guilty must always rest with the accused and no influence should be used to encourage a guilty plea. A fundamental element of our system of criminal justice is its ability to accommodate every not guilty plea with a complete trial consisting of all the procedural protections guaranteed by law. On the other hand, letting an accused know, through his counsel, the extent of the Crown's case against him cannot be said to constitute influence.

The Commission is of the opinion that an adequate system of disclosure would encourage more guilty pleas at an earlier stage. At present, cases frequently go through numerous remands, the setting of a trial date and subsequent postponement only to be determined ultimately by a guilty plea. We have already discussed many of the reasons for such delays. We have received numerous representations, with which we agree, that the attempt to maximize disclosure is another significant factor. Intimately related to disclosure is the whole question of "plea negotiation". Our recommendations with respect to the coordination of the flow of information between the police and Crown attorneys; the establishing of systems of disclosure of information to defence counsel; and plea discussions are contained in the next chapter.

Finally, we have received submissions that where both sides agree to a remand that it should be automatically granted. With this we disagree. It is essential that the progress of cases in the Provincial Courts (Criminal Division) be in the firm control of the presiding judges.

(e) *Conclusion*

The recommendations which have been put forward with respect to appointing additional personnel and improving the system whereby cases

[110]We further discuss "judge selection" in Part III when we consider the role of the legal profession.

are disposed of cannot be taken to represent a complete or ultimate solution to the problems in the administration of justice in the Provincial Courts (Criminal Division) in Metropolitan Toronto. We have already pointed out, for example,[111] that while the appointment of an administrative clerk responsible for the scheduling of cases on a day-to-day basis at "Old City Hall" would result in some improvements, the effectiveness of such a person would undoubtedly be limited as a result of problems inherent in a situation where a very large volume of cases must be accommodated in a single centralized structure. To put the matter another way, while our recommendations with respect to personnel and case disposition will undoubtedly result in some improvements at "Old City Hall", their full effect cannot be realized unless the total volume of criminal cases is broken down and cases are disposed of in a number of decentralized courthouses in Metropolitan Toronto, each possessing a separate and independent administrative system for this purpose. As we stated earlier, and stress again, it is imperative that the concept of decentralization be introduced as soon as possible into the planning of future accommodations for the Provincial Courts (Criminal Division) in Metropolitan Toronto.

D. Administration: Provincial Offences

Until now we have been discussing administration in the Provincial Courts (Criminal Division) with respect to offences under the *Criminal Code* and other federal statutes. The Commission has received a number of submissions to the effect that serious criminal offences should be separated and treated differently from minor violations under provincial statutes. We agree with these submissions.

A citizen charged with speeding or with a parking violation should not have his case dealt with in court along with such charges as rape and robbery. Few perhaps would deny the different degrees of culpability which our society recognizes and expresses in its laws with respect to the various categories of offences. A minor violation should not be associated in this manner with more serious offences. In addition, the manner in which these minor offences are dealt with in our present court system not only impedes the conduct of more serious criminal cases but also detracts from the level of formality appropriate to them.

There are, however, different degrees of seriousness with respect to the various provincial offences. It is our view that a neat separation is not possible simply on the basis of criminal offences as opposed to provincial offences. The line must be drawn elsewhere, and we discuss more fully later the manner of distinction which we consider to be appropriate.

At the beginning of this chapter[112] we pointed out that criminal cases represented less than 10% of the total volume of cases tried in the Provincial Courts (Criminal Division) in 1971. Approximately 48% of the total volume of cases involved offences under *The Highway Traffic Act*

[111] *Supra* at p. 42.
[112] *Supra* at p. 2.

(mostly speeding and other minor offences). Approximately 35% involved offences under municipal by-laws (mostly parking violations). The remaining 8% involved offences under *The Liquor Control Act* and other provincial statutes.

In terms of actual numbers, the Provincial Courts (Criminal Division) disposed of almost 2,000,000 cases involving provincial offences in 1971. Approximately one-half of these were dealt with in Metropolitan Toronto.[113] The vast majority concerned parking violations and minor traffic offences. We discussed earlier[114] the jurisdiction of Provincial judges and justices of the peace with respect to the trial of these offences. In practice, there is usually a fairly clear delineation of responsibilities between justices of the peace and Provincial judges, even for offences over which both have jurisdiction. Furthermore, that delineation varies from location to location. In many areas, usually where a low volume of criminal cases exists, a Provincial judge will hear all provincial offences as well as criminal offences. At the other extreme, in Metropolitan Toronto and Ottawa, for example, almost all provincial offences are tried exclusively by justices of the peace. Very often police officers act as prosecutors for these offences.

There has been a steady increase in Ontario in the accumulation of provincial charges which, for want of a better word, we refer to as a backlog. Recently, this increase has been assuming alarming proportions. For example, in 1972 the outstanding charges under *The Highway Traffic Act* were as follows:

January 1	—	131,904
June 30	—	138,630
September 30	—	154,243

Taking all provincial offences together for this period, this backlog has increased from 270,584 to 311,181. Increases in backlog have not been confined to any particular types of areas. They have occurred in both larger and smaller centres.

Another indication of the administrative problems which are being encountered in the Provincial Courts (Criminal Division) is the rapidly increasing balance of unpaid fines. The figures for the last five years are as follows:

	Metropolitan Toronto	*Ontario*
December 31, 1968	$1,186,668.85	$ 3,406,713.55
December 31, 1969	1,860,270.96	5,258,736.57
December 31, 1970	2,555,284.71	7,586,840.84
December 31, 1971	3,537,094.13	10,293,088.66
September 30, 1972	4,682,861.73	12,361,430.19

These figures are represented, in part, by over 200,000 warrants of committal which remain outstanding. These are warrants which are in

[113] *Annual Report of the Inspector of Legal Offices* 45 (1971).

[114] *Supra* at pp. 6, 7.

the hands of the police for execution. They do not include warrants which the police have returned to court offices because of the absence of available evidence as to the whereabouts of the person involved.

Quite apart from actual court time a vast amount of police time is spent simply serving summonses and executing warrants of committal for provincial offences. For example, in Metropolitan Toronto approximately 20 police constable and 60 police cadet[115] working-days are spent each day solely on these activities. Most of this work is related to offences under municipal by-laws and *The Highway Traffic Act*. The existing complement is unable to cope with the volume of work to be done and is falling behind at the rate of approximately 1,000 items per month. These items represent mostly warrants of committal and by-law summonses. Usually police officers process the warrants by the collection of the indicated amounts rather than by formal execution. The function is thus largely that of collecting fines.

With regard to certain traffic infractions, generally moving violations, it is necessary under the present law that the summons be served within 21 days of the date of the alleged offence.[116] On the other hand, no such rigid requirement is required for parking violations. The summons must, however, be issued within six months of the date of the alleged offence. There are many examples where summonses are not issued until several months after the alleged violation. Indeed this may typify the rule rather than the exception in Metropolitan Toronto.

To cite only one example which arose from a complaint made to the Ministry of the Attorney General by a resident of Toronto, the resident was charged that he illegally parked a motor vehicle on October 14, 1971. The summons was not issued until January 25, 1972. The court hearing was scheduled for March 3, 1972, almost five months after the alleged offence.

Another aspect of delay arises to some extent from the system adopted to accommodate police officers appearing as witnesses. As a general rule, police officers and traffic control officers have certain days that are assigned to them as "court days". These are the days on which they are expected to attend in court to give evidence in relation to traffic offences for which they have issued tickets or summonses. An officer is usually assigned one day a month for this purpose.

There are many officers who are assigned the same day of the month and whose cases will be heard in the same courtroom. Obviously, the courtroom can accommodate only a certain number of cases on its docket on any one day. Thus a ticket issued by any given officer has to be assigned to a date that is the court date assigned to that officer, which may be, for example, the second Tuesday of each month. If that officer "tickets" somebody on the second Wednesday of September, the first court date on which the case usually would be heard under the present system would be the second Tuesday of October. If it is found that the courtroom docket

[115]At an approximate average salary of $500 per month.

[116]*The Summary Convictions Act*, R.S.O. 1970, c. 450, s. 6(5).

for the second Tuesday is filled, the case will automatically be scheduled (by a computer in the case of the scheduling of traffic violation court days in Metropolitan Toronto) for the second Tuesday in November, the second Tuesday in December, etc. until there is a docket available that can accommodate that case. The officer could be said to be "competing" with other officers whose "court day" is also the second Tuesday of the month. Similarly, if the case is adjourned on the date for which it is ultimately scheduled for court appearance, it cannot be rescheduled until a month is reached when the second Tuesday does not have a full docket.[116a]

A similar situation applies to the night courts. In Metropolitan Toronto, when a person receives a summons to appear in a specific day court he is given the option to apply for a night court. At present the day court will probably be several months in the future. If the person applies to have the case transferred to the night court, all the documents relating to his case are kept in a file *until the day court date*. Following the day court date, the case is then assigned to a night court date, usually one month in the future. As the night courts have a relatively small number of cases on their dockets no specific problem arises in placing the case on the docket for the date assigned to the officer as his "night court date". After the assignment of the case to the night court date, however, the police will then usually have a month in which to serve personally a night court summons. In a number of cases the police are unable to locate the person and in these instances the night court date is changed.

Another problem which arises is that police officers sometimes simply do not appear as scheduled. We have found that this occurs with great frequency in the night traffic courts, although not as frequently in the day traffic courts. It also seems clear that there are a considerable number of persons who are well acquainted with the procedure in the traffic courts. They know that if they plead not guilty there is a good chance for acquittal on the ground that no evidence will be presented.

Where the accused has been properly served and fails to appear the presiding justice has the discretion to proceed with the trial of the case in his absence, to adjourn the case and issue a warrant for his arrest, or simply to adjourn the case in the absence of the accused. The usual practice is to try the case in the absence of the accused. When this occurs, the court hears the evidence of the officer given under oath. There will of course be no defence evidence as the accused is absent. The evidence given in the absence of the accused is either taken down by a court reporter or the witness speaks into a tape recorder. Frequently in a traffic court there will be a number of cases heard *ex parte*. When this occurs the *ex parte* cases are left until the end of the day after all the accused persons who have attended court have been heard.

The court proceeds most expeditiously with its *ex parte* hearings. A police officer is sworn and takes the stand. The police prosecutor reads out

[116a]At present the delay in scheduling cases may be as much as three to five months or even longer in Metropolitan Toronto.

the number of summonses, the police witness reads from the charge, the clerk checks for proper service and the judge or justice of the peace convicts and fines. Often 30 to 40 cases are dealt with in 10 to 15 minutes. The odd case is dismissed for absence of evidence or withdrawn. Parking violations form the bulk of these charges but they may include other traffic offences such as illegal turns or going through traffic lights.

The haste with which these cases are dealt with tends to carry over to the disposition of cases in which a defendant is present.

Instances have also come to our attention of prosecutors badgering defendants on the stand, of justices of the peace cutting off attempts of defendants to cross-examine, and of a general atmosphere of haste and indifference in the courtrooms.

The matters which we have been discussing are, in our view, evidence of a much larger problem. The whole system of administration of provincial offences is collapsing, not only in court but also with respect to the service of summonses, execution of warrants and the vast amount of related paperwork. Police resources are being used to enforce parking tags while subpoenas in serious criminal cases are being sent by ordinary mail. Some police officers do not bother to attend as witnesses. Defendants are acquitted apart from the merits. The latter result may be unobjectionable if some other desirable purpose is served, but if acquittal is simply the consequence of administrative incapacity it can only encourage disrespect for the system.

We recommended in relation to criminal offences an increased allocation of resources in order to reorganize and tighten the control over present systems of administration. While we recommend a similar approach with respect to the more serious provincial offences, our recommendations generally with respect to the administration of provincial offences are based upon the premise that certain of these offences do not require for their disposition the full-scale judicial treatment, and the procedures and protections concomitant thereto, afforded other offences in the Provincial Courts (Criminal Division). Furthermore, a greater degree of separation than exists at the present time should be effected, for purposes of disposition, between the more serious provincial offences and the less serious ones, so that the different degrees of culpability recognized by society with respect to various offences may be given tangible expression.

We recommend that provincial offences be divided into three broad categories. The first should include those provincial offences which carry with them the most serious penalties. Examples would be offences such as careless driving or failing to remain at the scene of an accident, for which *The Highway Traffic Act*[117] provides for a fine of not less than $100 and not more than $500 or to imprisonment for a term of not more than six months, or both, and in addition a licence or permit suspension of up to two years. Serious offences also arise under other provincial statutes, such

[117]R.S.O. 1970, c. 202, ss. 83, 140.

as *The Liquor Control Act*[118] and *The Securities Act.*[119] Earlier in this chapter[120] we recommended closer supervision and control over justices of the peace by Provincial judges. We recommend that the provincial offences in this first category not be assigned by Provincial judges for disposition by justices of the peace. Persons accused of such offences should, so far as is practicable, be tried by Provincial judges under the same procedure as that provided for criminal summary conviction offences. At the same time, a useful purpose might be served if a reexamination were undertaken by the proper authorities of the summary conviction provisions contained in Part XXIV of the *Criminal Code.*[121] It is also intended that the recommendations put forward with respect to the administration of criminal offences apply in their entirety to the administration of these provincial offences.

The second category should include all other provincial offences except those minor traffic offences which are discussed later. The wide range of provincial offences included within this category, which would comprise the majority of provincial offences (although not the majority of actual charges), would be dealt with either by Provincial judges or justices of the peace. In this regard we stress the desirability that cases not be assigned automatically to justices of the peace on the basis of whether or not they fall within a certain category (*e.g.*, breaches of municipal by-laws). The assignment should take into consideration the complexity of the facts and of the legal principles which may be applicable; where a difficult point of law is at issue, for example, the case should be tried by a Provincial judge. We recommend further that persons accused of these offences be tried where possible separately from those persons who have been accused of the more serious offences in the previous category.

The Commission has received numerous representations from the public, members of the bar, and the Ontario Association of Chiefs of Police concerning the undesirability of the present practice whereby these offences are generally prosecuted by police officers. We have already made recommendations with respect to relieving police officers of many of the duties carried out by them at the present time in the Provincial Courts (Criminal Division).[122] The same considerations underlying those recommendations apply here. In almost every case where there is a police prosecution the information has been laid by the police officer. The witnesses for the prosecution are invariably police officers, and the prosecutor in many cases is addressed by his police rank. Quite apart from the manpower demands which are imposed on the police as a result of police officers acting as prosecutors, it is our view that public confidence in the courts, as reflected in the expectation that an objective hearing is being received, will be increased if police officers are removed from this role. We so recommend. In chapter 2 we recommend that police officers be replaced by law clerks, retired police officers or students-at-law under the supervision and direction of the Crown attorney.

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[118]R.S.O. 1970, c. 249.

[119]R.S.O. 1970, c. 426.

[120]*Supra* at p. 17.

[121]An example of a provision which ought to be reviewed is that contained in s. 744 of the *Criminal Code* empowering a summary conviction court to award costs against a person convicted of a summary conviction offence.

[122]*Supra* at p. 27.

As indicated earlier,[123] a variety of statutory sources must be consulted in order to determine the procedures involved in the disposition of provincial offences, starting with *The Summary Convictions Act*,[124] which incorporates, subject to certain variations, the summary procedure set out in Part XXIV of the *Criminal Code*. The procedures set out in *The Summary Convictions Act* are themselves subject to special provisions contained in other provincial statutes, such as the provisions of *The Liquor Control Act*[125] and *The Liquor Licence Act*[126] which require prosecutions under those statutes to take place before two or more justices of the peace where a Provincial judge is not available. The latter requirement we consider to be an anachronism, and entirely unnecessary if our recommendations with respect to the appointment, training and supervision of justices of the peace are adopted. We recommend that the relevant provisions of *The Liquor Control Act*, *The Liquor Licence Act*, and any other statute where similar provisions may be present, be changed to permit prosecutions under these statutes to be conducted before a Provincial judge or a single justice of the peace.

More generally there is a need for a reexamination, with respect to this second category of provincial offences, of the entire range of procedural provisions applicable to the disposition of provincial offences, with a view to simplifying them and removing the anomalies and inconsistencies contained therein. By way of example, the provisions of *The Liquor Control Act*[127] and *The Liquor Licence Act*[128] establish an appeal procedure which is entirely separate from that provided for under *The Summary Convictions Act*.[129]

The third category of provincial offences should include all those minor traffic offences which are essentially breaches of regulatory measures and thus lack that element of moral turpitude normally associated with offences which reflect a failure to observe a certain standard of behaviour. Included in this category would be violations of municipal parking by-laws and some minor offences under *The Highway Traffic Act* such as some speeding offences, littering the highway, driving a noisy vehicle, *etc.* (The ascertaining of what minor offences should be included within this category should be a matter for critical examination.) As already noted, parking violations comprise the majority of the offences committed under municipal by-laws, these offences constituting in turn approximately 35% of the total number of cases disposed of in the Provincial Courts (Criminal Division).

This third category of "offences" should be designated as "infractions" and should be dealt with separately from the other categories of provincial

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[123]*Supra* at p. 7.

[124]R.S.O. 1970, c. 450.

[125]R.S.O. 1970, c. 249, s. 102.

[126]R.S.O. 1970, c. 250, s. 1.

[127]See s. 114 thereof.

[128]See s. 67 thereof.

[129]In chapter 5 Part I of this Report we recommended that the trial *de novo* in summary conviction offences be replaced by an appeal on the record with power in the appeal court to consider not only the record but also to hear further and other evidence in appropriate cases, and that the provisions of *The Summary Convictions Act*, *The Liquor Licence Act* and *The Liquor Control Act* be amended accordingly.

offences. Modifications should be introduced, with respect to these infractions, in the existing procedures which provide for a set date for appearance established prior to the service of the summons, the use of summonses, the method of adjudication and the method of enforcement of orders. Essentially the same basic procedures with respect to the foregoing are followed in prosecuting what we term infractions as are followed for serious criminal offences. Not only has the necessity for complying with them been the most important factor contributing to the breakdown of the system for administering the huge volume of provincial offences, but the procedures which are followed are out of all proportion to the conduct constituting the infractions.

We recommend that where an infraction is alleged to have been committed a ticket be left on the vehicle or handed to the offender setting out details of the infraction and specifying the amount of the fine to be paid. If the fine is not paid by a certain date, a "notice of infraction" should be sent by prepaid registered post to the driver or owner of the vehicle, as the case may be, indicating that a fine has been assessed against him and requiring him either to pay the specified fine, together with an additional amount for costs, or to appear before (rather than on) a specified date if he wishes to dispute the assessment. The notice should also indicate that if an appearance is not made before the specified date to show cause why a fine should not be assessed, commission of the infraction shall be deemed to be admitted. Personal service of the notice of infraction should not be required. (Under the present law, while a summons may be sent by prepaid post, a summons so sent is deemed not to have been served except in certain circumstances, such as where the person summoned appears pursuant to the summons.[130]) We recommend below that provision be made for exceptional circumstances such as where the person involved is not aware of the existence of the original ticket and has not received the notice of infraction.

Persons who wish to dispute the assessment would thus be able to do so at any time before a certain date. We recommend that hearings for this purpose be conducted by justices of the peace. These hearings should be entirely separate from proceedings held for the trial of persons accused of other provincial offences and should be characterized by a certain degree of informality. It should not be necessary for the police witnesses to appear at such hearings, nor should there be a prosecutor present. The justice of the peace would attempt to determine the facts and, taking into account any explanation of the person's conduct that may be forthcoming but disregarding mere technical irregularities in the ticket or notice of infraction, would be able to nullify or reduce the assessment, confirm the fine assessed or, in the appropriate circumstances, refer the matter for trial in the usual manner in the Provincial Courts (Criminal Division).[131]

In the event that the fine is not paid (either in the first instance, or through a failure to pay within the time limits imposed where the fine has

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[130] *The Summary Convictions Act*, R.S.O. 1970, c. 450, s. 6(4).

[131] Since this was written it has come to our attention that the Attorney General plans to introduce a procedure for disposing of minor traffic offences in an informal manner. See *The Globe and Mail*, March 12, 1973.

been confirmed by a justice of the peace at a hearing), we recommend that collection of the fine be effected in an essentially administrative manner, either by adding the amount of the fine to the cost of renewing the motor vehicle permit or driver's licence, or by providing for the automatic suspension of the motor vehicle permit or driver's licence until such time as the fine is paid.[132] This would relieve police officers of at least some of their present responsibilities for collecting fines, to which reference was made earlier, as well as cutting down the number of occasions on which default is made in the payment of fines.

There are, of course, complications which must be considered, quite apart from a consideration of the legislative changes which would be required in order to implement the foregoing proposals. Special provisions would be required with respect to out-of-province offenders. It would also be necessary to allow for special applications to set aside the fine or licence suspension in exceptional circumstances such as, for example, when the person involved is for some reason not aware of the existence of the original ticket, has not received the notice of infraction and has a substantial defence. Nevertheless these problems are far from insurmountable.[133]

Several consequences would flow from the procedure suggested for the disposition of infractions. The police would be freed of some of their duties with respect to the service of summonses and the collection of fines. Hearings would not have to be scheduled so as to accommodate police officers (unless the justice of the peace holding the hearing directs that a trial be held, in which case the trial would be scheduled in the ordinary manner for some future time). The majority of cases which at the present time are dealt with "by default", and which require for their disposition the attendance of police officers, would be handled essentially administratively. This would contribute to lowering the backlog of other cases disposed of in the Provincial Courts (Criminal Division). The number of unpaid fines would be reduced, as would the number of acquittals resulting from technical irregularities arising out of the inability of the existing system to handle the present volume of cases. Finally, the procedure suggested for the treatment of infractions would, if adopted, result in a manner of disposition more appropriate to the nature of the conduct sought to be thereby regulated.

In conclusion, we wish to make it clear that it is not to be implied from the criticism we have made of the administrative processes of the Pro-

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[132]We note that the provisions of *The Highway Traffic Amendment Act, 1972*, S.O. 1972, c. 128 came into force on April 2, 1973. The amendment provides for a new section (s. 26a) to be added to *The Highway Traffic Act*. Subsection (2) of s. 26a, which, it will be noted, does not cover default in the payment of a fine imposed for breach of a muncipal parking by-law, provides as follows:

> Where a justice is satisfied that a person is in default of payment of all or any part of a fine imposed upon conviction for an offence against *The Highway Traffic Act*, *The Public Vehicles Act*, *The Public Commercial Vehicles Act* or the regulations made under any of them, he may, in addition to any other order which may have been made under *The Summary Convictions Act*, issue an order to the Registrar directing the suspension of the driver's licence of such person and the Registrar shall suspend the licence.

[133]Provision already exists in *The Highway Traffic Act*, for example, for an appeal to the Licence Suspension Appeal Board by a person who deems himself aggrieved by a decision of the Registrar of Motor Vehicles suspending or cancelling any permit or licence. See ss. 27-29 thereof.

vincial Courts (Criminal Division) that we are criticizing the Chief Judge of these courts in the performance of his duties. The Chief Judge has been required to perform his administrative duties, especially in the Judicial District of York, under conditions for which he has been in no way responsible. These conditions have been such that in our view, satisfactory operation of the courts has not been possible. Our hope is that the required remedial steps which we have recommended in this Report will be taken promptly so that an administrative structure for the courts will be provided within which the Chief Judge may carry out all the duties attached to this office for which he is so well qualified.

E. Summary of Recommendations

Preliminary Matters

Structure of the Provincial Courts (Criminal Division)

1. The Provincial Courts (Criminal Division) of the various counties and districts should be reconstituted as a single court of record for the Province as a whole with a branch in each of the counties and districts.

Provincial Judges

2. *The Provincial Courts Act* should be amended so as to restrict eligibility for future appointments to the office of Provincial judge to those persons who are or have been members of the bar of one of the provinces of Canada for at least five years.

3. *The Provincial Courts Act* should be amended so as to provide as a condition precedent to the making of any appointment to the office of Provincial judge that the Attorney General request and receive a report from the Judicial Council.

4. The Chief Judge of the Provincial Courts (Criminal Division) should consider assigning newly appointed judges to sit for a certain period of time as observers in one or more courts presided over by experienced judges.

5. Persons actively engaged in the practice of law should not be allowed to sit as Provincial judges on a part-time basis.

6. A "pool" of retired Provincial judges should be built up, with representation from as many regions of the Province as possible, from which *ad hoc* appointments of part-time judges on a *per diem* basis can be made when extra judicial personnel are required due to illnesses or other emergencies.

7. The present salary levels for Provincial judges are too low. They should be raised so as to reflect more adequately the work which Provincial judges must perform and to encourage a larger number of well-qualified persons into seeking the office.

8. The salary levels for Provincial judges should be fixed by statute.

9. Salary ranges for Provincial judges should be eliminated, with all Provincial judges receiving the same salary, except for the Chief Judge and the senior judges.

10. Provincial judges should be exempt from the length of service requirements for sick leave applicable to civil servants and there should be no limitation on the number of days a judge may be absent owing to illness, such absence being properly documented.

11. Pension and disability benefits for Provincial judges and their dependants should be provided by statute on a non-contributory basis, in a manner similar to that for federally appointed judges.

12. The provisions laying down pension benefits for Provincial judges should not contain restrictions based upon payments received for sitting on a *per diem* basis.

13. All Provincial judges should receive one month's annual vacation.

14. Consideration should be given to the granting of a period of leave for Provincial judges every five years, on the approval by the Chief Judge of a proposed programme of study or research.

15. *The Marriage Act* should be amended so as to relieve Provincial judges of their duties with respect to the solemnization of marriage.

16. *The Master and Servant Act* should be reconsidered and amended so that the jurisdiction granted under that Act with respect to directing the payment of wages is transferred from Provincial judges to the Small Claims Court or Small Claims Court judges.

17. Section 12(2) of *The Provincial Courts Act*, which permits a judge with the previous consent of the Attorney General to act as arbitrator, conciliator or member of a police commission, should be repealed and judges of the Provincial Courts (Criminal Division) should be specifically prohibited from so acting.

Justices of the Peace

18. A complement of justices of the peace should be appointed for each of the counties and districts in Ontario, with the number of justices of the peace to be appointed to each county and district being set by regulation.

19. Justices of the peace should not be permitted to exercise their powers outside the county or district to which they are appointed.

20. There should be close supervision and control over justices of the peace by Provincial judges, with ultimate responsibility for super-

vision and control being exercised by the Chief Judge of the Provincial Courts (Criminal Division).

21. Section 6 of *The Justices of the Peace Act* should be replaced by a provision requiring a justice of the peace to exercise such duties conferred upon him by federal or provincial legislation as may be assigned to him by a Provincial judge.

22. The power given to Crown attorneys under *The Crown Attorneys Act* to "advise justices of the peace with respect to offences against the laws in force in Ontario" should be conferred on Provincial judges as part of their general supervision over justices of the peace in their county or district.

23. Court clerks should not be allowed to sit in court as justices of the peace to conduct trials after a full day's work carrying out other duties.

24. Justices of the peace should be appointed generally on a full-time basis. In remote areas, where the appointment of full-time justices of the peace may not be warranted, suitable government officials should be appointed to act as justices of the peace on a part-time basis.

25. Section 8 of *The Justices of the Peace Act*, which provides for payment of fees or allowances to justices of the peace, should be repealed and justices of the peace should be paid on a salary basis only. The salary should be commensurate with the duties required of the office.

26. A provision should be enacted in *The Justices of the Peace Act* prohibiting the exercise of any of the powers of a justice of the peace except by a justice of the peace receiving a salary as such.

27. Section 2(2) of *The Justices of the Peace Act*, which provides that a person other than a barrister cannot be appointed as a justice of the peace unless he has been examined and certified by a County Court judge, should be repealed.

28. A Justices of the Peace Council should be established, to be composed of the Chief Judge of the Provincial Courts (Criminal Division), one additional Provincial judge, one justice of the peace and two other persons appointed by the Lieutenant Governor in Council. The functions of the Council would be to consider the proposed appointments of justices of the peace and to report thereon to the Attorney General, to receive complaints respecting the misbehaviour of or neglect of duty by justices of the peace and to take appropriate action with respect to the investigations thereof.

29. The Attorney General should be required to request and receive a report from the Justices of the Peace Council prior to making appointments to the office of justice of the peace.

30. The present educational programmes for justices of the peace should be expanded, and basic training should be provided in such matters as statutory interpretation and the admissibility of evidence in order that justices of the peace may discharge properly the judicial duties imposed upon them. Responsibility for developing educational and training programmes should rest with the Chief Judge of the Provincial Courts (Criminal Division).

The Chief Judge and Senior Judges

31. *The Provincial Courts Act* should be amended to state more explicitly the authority and duties of the Chief Judge and senior judges. Such duties should be specified in the Act itself rather than in the regulations made pursuant thereto.

32. Among the duties envisaged for the Chief Judge, apart from that of participating in the adjudicative processes of his courts, would be the following:

(1) assigning Provincial judges throughout the Province and arranging sittings;

(2) exercising general supervision and control over Provincial judges and justices of the peace;

(3) developing and supervising educational and study programmes for Provincial judges and justices of the peace;

(4) establishing guidelines on policy matters related to practice and procedure with a view to encouraging uniformity of judicial practice; and

(5) drawing to the attention of the Attorney General imminent retirements or resignations of judicial personnel, as well as vacancies which have not been filled.

33. The Chief Judge should be given a highly qualified executive assistant to assist him in the carrying out of his administrative responsibilities.

34. The senior judges should be required by statute to carry out within their respective regions, under the direction and supervision of the Chief Judge, such duties as may be assigned to them by the Chief Judge.

35. Judges should be designated as senior judges for a three year term, subject to reappointment, and the Attorney General should be required to consult with the Chief Judge prior to making any such appointments.

Places of Sittings

36. The present organization of the sittings of the Provincial Courts (Criminal Division) should be reconsidered by the Chief Judge in consultation with the Provincial Director of Court Administration and the Regional Directors of Court Administration, in the light of changes in such conditions as transportation facilities and court

workloads. The organization of the sittings should be continually reviewed.

37. In outlying areas, sittings should be scheduled more on an *ad hoc* basis as the volume of cases requires, with reliance also being placed on the use of part-time judges on a *per diem* basis where the use of full-time judges would result in a disruption of case scheduling in other areas. Justices of the peace could also be assigned small "circuits" within the county or district to deal locally with matters within their jurisdiction, in order to lessen the amount of time spent travelling by Provincial judges.

Administrative Personnel

38. Administrators or court clerks operating at the local level should be referred to as "administrative clerks".

39. No person should be appointed as administrative clerk to a centre having a population exceeding 100,000 persons who does not have qualifications at least equal to those of a person at the level of Executive Officer 1.

Physical Facilities

40. Courtrooms and court facilities should be such as to permit the administration of justice with the degree of dignity necessary to encourage respect for the law.

Role of Police Officers in Court

41. Police officers should be removed from their present role as court officers and appropriately trained civilian personnel should be added to the court staff for such purposes as maintaining security and serving as ushers. Police officers should also be removed from their present role with respect to case scheduling.

42. Responsibility for transporting prisoners between correctional institutions and the courts should be placed clearly in the hands of the staff of the correctional institutions.

Witnesses

43. The daily allowances for witness fees, together with the related travel and living expenses, should be increased so as to lessen the financial losses suffered by those persons required to attend as witnesses and to reflect properly their important role in the administration of justice.

Administration: Criminal Offences

Systems of Administration in Ontario Generally

44. Systems of administration at the local level in the Provincial Courts (Criminal Division) outside Metropolitan Toronto should be for-

malized locally, with each locality where the Provincial Court sits committing its system for disposing of cases to writing. The Crown, defence counsel and the administrative clerk should be consulted with respect to introducing modifications. A description of the system should be posted at the local courthouse and distributed to members of the local bar. This process of formalizing systems of administration should start immediately.

45. The responsibility for reviewing and further developing systems of administration should rest with the Regional Directors of Court Administration, in consultation with the Chief Judge and senior judges.

Metropolitan Toronto

46. The administration of justice in the Provincial Courts (Criminal Division) in Metropolitan Toronto should be decentralized, with the daily volume of cases being broken down and dealt with by a number of separate and independent administrative systems, each located in a separate decentralized courthouse with a complete establishment of judicial, court and Crown personnel assigned on a long-term basis (including an administrative clerk responsible for the scheduling of cases on a day-to-day basis).

47. The degree of decentralization should be based upon the concept of the optimum number of cases that can be handled by a single unit on a regular basis under close judicial and administrative control. The volume of cases should be low enough to enable the cases to be dealt with in the first instance in one remand court, subject to personal supervision by the administrative clerk without a high degree of delegation or division of responsibility.

48. At least three decentralized courthouses should be built in Metropolitan Toronto as soon as possible, with more being built as future circumstances warrant.

49. Consideration should be given to establishing a first appearance court sitting on a continual basis in the proposed decentralized courthouses.

50. The Law Society of Upper Canada and the Government of Ontario should review the existing situation with respect to the granting of legal aid certificates with a view to ascertaining how such certificates may be obtained more expeditiously and whether, to this end, a branch of the Legal Aid Office should be situated in each of the decentralized courthouses.

51. The new courthouses should have proper facilities for holding prisoners.

52. Until such time as courthouses can be built in accordance with the foregoing requirements, consideration should be given to leasing buildings to serve as courthouses.

53. "Old City Hall" should not continue to be used to house the Provincial Courts (Criminal Division) in Metropolitan Toronto for any longer than is absolutely necessary.

54. A senior judge should be appointed immediately for the region which includes Metropolitan Toronto.

55. Insofar as "Old City Hall" continues to serve as a courthouse in Metropolitan Toronto prior to implementation of our proposals with respect to decentralization, an administrative clerk should be appointed immediately at "Old City Hall" to be responsible for the day-to-day scheduling of cases.

56. Four extra Crown attorneys should be assigned immediately to "Old City Hall".

57. The four Provincial judge vacancies in Metropolitan Toronto should be filled immediately.

58. The regular establishment of judges in Metropolitan Toronto should not be drawn upon in order to meet the needs of other areas.

59. In order to establish the expectation of all parties concerned that trials will proceed on the date set and to lessen delays, an attempt should be made to demarcate more clearly the remand courts from the trial courts at "Old City Hall".

60. Where circumstances warrant, trials should be fixed for half-days or scheduled by the hour.

61. Judges should be assigned to remand courts on a one day per week basis rather than for five days per week for one month at a time.

62. Cases should be remanded for periods of seven days or multiples of seven days in order to provide for some continuity between individual judges and particular cases.

63. Where "specialty" courts are established judges should also be assigned to them on a one day per week basis.

64. Certain steps should be followed before a case is forced on to trial, such as the court warning the accused of the consequences of not being represented by counsel and ordering the proceedings to be recorded by the court reporter and a transcript made available to the trial judge as required.

65. Remand courts should commence prior to the regular court times, in order to lessen court scheduling conflicts for counsel.

66. *The Law Society Act* should be amended so as to render the failure of counsel without lawful excuse to appear as scheduled a provin-

cial offence. Such counsel should also be reported to the Law Society of Upper Canada for possible disciplinary action.

67. Trial judges should take the same strict attitude with the Crown as with defence counsel with respect to proceeding at the time and on the date scheduled.

68. The system of scheduling cases should be such as to discourage counsel from seeking remands in order to avoid a particular judge.

Administration: Provincial Offences

69. A greater degree of separation than exists at the present time should be effected, for purposes of disposition, between the more serious and the less serious types of provincial offences.

70. Those provincial offences which carry with them more serious penalties should not be assigned by Provincial judges for disposition by justices of the peace but should, so far as is practicable, be dealt with by Provincial judges under the same procedure as that provided for criminal summary conviction offences, and subject to the recommendations put forward with respect to the administration of criminal offences.

71. Police officers should be removed from their role as prosecutors of provincial offences and should be replaced by law clerks, retired police officers or students-at-law under the supervision and direction of the Crown attorney.

72. Statutory provisions such as those contained in *The Liquor Control Act* and *The Liquor Licence Act* requiring prosecutions under a particular statute to take place before two or more justices of the peace where a Provincial judge is not available should be changed to permit prosecutions to be conducted before a Provincial judge or a single justice of the peace.

73. The entire range of applicable procedural provisions should be examined, with respect to the disposition of the less serious provincial offences, with a view to simplifying them and removing the anomalies and inconsistencies contained therein.

74. A separate procedure for the disposition of "infractions", namely municipal parking by-law violations and certain minor offences under *The Highway Traffic Act*, should be established. This procedure, details of which are set out in the text, would involve a ticket specifying the fine to be paid, an informal hearing by a justice of the peace in the absence of a prosecutor or police witnesses held pursuant to a "notice of infraction" sent by prepaid registered post upon the failure to pay the fine specified on the ticket, and the collection of fines through the administration of motor vehicle permits and drivers' licences.

F. Memorandum of Reservations of The Honourable J. C. McRuer

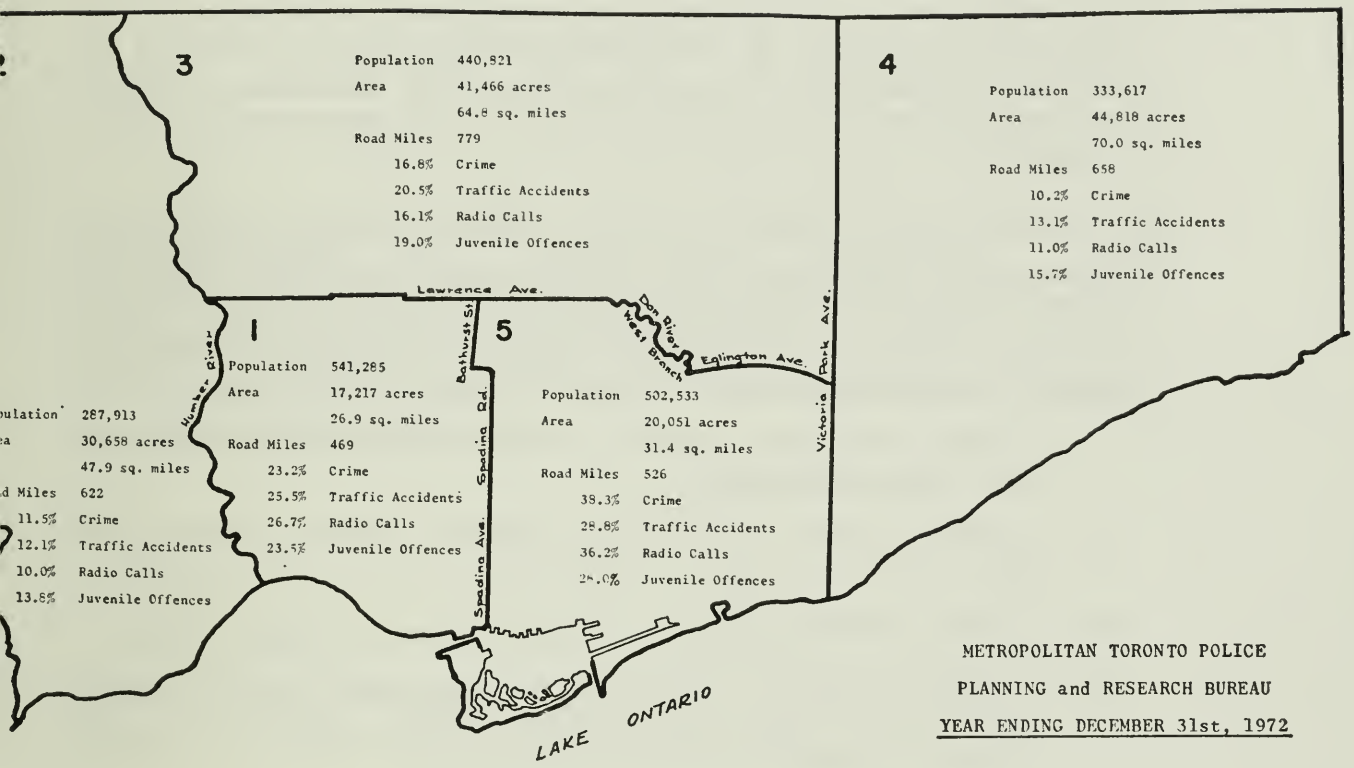
While I concur generally with the recommendations made in this chapter, I wish it to be clearly understood that in doing so it is not to be implied that I am departing from the views I expressed in chapter 2 of Part I of our Report concerning the plan for the structure for court administration. There I expressed the view that there should be no Regional Directors of Court Administration with combined duties respecting the High Court of Justice, the County Courts (including the Surrogate Courts and Small Claims Courts), the Provincial Courts (Criminal Division) and the Provincial Courts (Family Division). The view I expressed was that there should be a Provincial Director with four Deputy Directors, one assigned to each of the courts respectively, the High Court of Justice for Ontario, the County Courts (including the Surrogate Courts and Small Claims Courts), the Provincial Courts (Criminal Division) and the Provincial Courts (Family Division). Each Deputy Director would be concerned with the administration of the particular court to which he was assigned and he would work in close cooperation with the Chief Justice and the Chief Judges of the respective courts.

My recommendation is that the duties proposed in this chapter for the Regional Directors concerning the administration of the Provincial Courts (Criminal Division) be performed by the Deputy Director of Court Administration for the Provincial Courts (Criminal Division).

My view is that these administrative duties are far too complex to be distributed among five or six Regional Directors of Court Administration who would have duties concerning courts which differ widely from the jurisdiction exercised in the Provincial Courts (Criminal Division). The circumstances in these courts are such that they require a high degree of specialization and the undiluted attention of a special administrator.

APPENDIX I

METROPOLITAN TORONTO POLICE DISTRICT BOUNDARIES



METROPOLITAN TORONTO POLICE
PLANNING and RESEARCH BUREAU
YEAR ENDING DECEMBER 31st, 1972

APPENDIX II

THE LAW SOCIETY OF UPPER CANADA
NOTICE TO THE PROFESSION

The Law Society has adopted the following principles as those that should govern the right of counsel to withdraw from a criminal case prior to its commencement:

1. It is improper for a lawyer who has agreed to act to withdraw from a criminal case because of non-payment of fees where the date set for trial is not sufficiently far removed to enable the client to obtain another Counsel, or to enable such other Counsel to prepare adequately for trial.

2. A lawyer who has agreed to act may withdraw from a criminal case because the client has not paid the fee agreed to be paid where the interval between the withdrawal and the trial of the case is sufficient to enable the client to obtain other Counsel and sufficient to allow such other Counsel adequate time for preparation, provided that the lawyer:

   (i) Notifies the client in writing that he is withdrawing because his fees have not been paid.

   (ii) Accounts to the client for any monies received on account of fees.

   (iii) Notifies Crown Counsel in writing that he is no longer acting.

   (iv) Notifies the clerk or registrar of the appropriate Court in writing that he is no longer acting where his name appears as Counsel for the accused on the records of the Court.

   The requirement contained in sub-paragraph (iv) has not previously been considered a requirement. This may be due, in part, to the fact that in all Counties in Ontario, except York County, the Crown Attorney is also the clerk of the peace who has by law the custody of certain documents relating to criminal cases. It is considered, however, that such a requirement is desirable as a courtesy to the Court and, indeed, to protect the lawyer himself from unwarranted criticism by the Court, and consequent loss of confidence by the Public in the Profession, if there has been a failure on the part of Crown Counsel to inform the Court that he has received timely notification of the withdrawal by Counsel. This might occur through inadvertence where a Crown Attorney, who is a member of a large staff, is asked to act in a particular Court on very short notice and there is no document in the records of the Court relating to withdrawal.

3. A lawyer who has undertaken the defence of a criminal case may withdraw from the case for adequate cause other than non-payment of fees, where the interval between the time of withdrawal and the trial of the case is sufficient to allow the client ample time to obtain other Counsel and to permit such Counsel to prepare adequately for trial, subject to the same requirements of notice to the client, accounting for

monies received, notice to Crown Counsel and notice to the Court which apply where he desires to withdraw because of non-payment of fees. Where a Lawyer has withdrawn because of conflict with the client he should not under any circumstances indicate in a notice of withdrawal addressed to the Court or Crown Counsel the cause of the conflict or make reference to any matter which would violate the privilege which exists between a Solicitor and his Client. The notice should merely state that he is no longer acting and has withdrawn.

4. Where Counsel is justified in withdrawing from a criminal case, for a reason other than the non-payment of fees, and there is not a sufficient interval between the notification to the client of his intention to withdraw and the date upon which the case is to be tried to enable the client to obtain other Counsel and to enable such Counsel to prepare adequately for trial, Counsel may nevertheless withdraw from the case if, but only if, the Court before which the Case is to be tried grants him permission to withdraw. Where circumstances arise which in the opinion of Counsel require him to apply to the Court for leave to withdraw, he should promptly inform Crown Counsel and the Court of his intention to so apply in order to avoid or minimize inconvenience to the Court and witnesses.

CHAPTER 2

OFFICE OF THE CROWN ATTORNEY

SUMMARY

A. History of Public Prosecutions in Ontario

B. Functions and Duties of Crown Attorneys
   1. Prosecutorial
   2. Advisory
      (a) Advice to the Police
      (b) Advice to Justices of the Peace
      (c) Advice to Members of the Public
   3. Under *The Coroners Act*
   4. As Clerk of the Peace
   5. Other Duties of Crown Attorneys

C. Status
   1. Appointment
   2. Termination of Employment

D. Assignment of Personnel
   1. Location of Crown Attorneys and Assistant Crown Attorneys
   2. Part-time Crown Attorneys
   3. Regional Organization
   4. Police as Prosecutors
      (a) Law Clerks
      (b) Retired Police Officers
      (c) Students-at-law

E. Instruction Briefs and Disclosure
   1. Preparation for Trial
      (a) Provincial Courts (Criminal Division)
      Problems Peculiar to Northern Ontario
      (b) County Court Judges' Criminal Courts and General Sessions of the Peace
      (c) The Supreme Court of Ontario
   2. Coordination of the Flow of Information before Trial
      (a) Provincial Courts (Criminal Division)
      (b) County Court Judges' Criminal Courts and General Sessions of the Peace

F. Education and Training of Crown Attorneys
   1. Opportunities for Education and Training before Entering the Office of Crown Attorney
   2. In-Service Training
   3. Regional Meetings of Crown Attorneys
   4. Meetings of the Crown Attorneys' Association

A. History of Public Prosecutions in Ontario

In Ontario, most criminal prosecutions are conducted by Crown attorneys and their assistants.[1] They are agents of the provincial Attorney General acting in the name of the Crown. The office is defined by statute.[2]

Originally the authority to prosecute rested with the Attorney General and his officers at the capital of Upper Canada. As the population of Ontario expanded it became increasingly difficult for the law officers of the Crown effectively to perform their duties.[3] In 1859, statutory authority was granted for the creation of prosecution offices in each county.[4] The County Crown attorney was empowered, *inter alia*, to receive and examine informations from magistrates and to conduct further investigations if necessary, sue out process to compel attendance of witnesses and watch over private prosecutions, taking them over if necessary. He was made responsible for instituting and conducting prosecutions for felonies and some summary matters.[5] The duties of the office of Crown attorney have remained substantially the same since its inception, but other statutory powers and duties have been conferred upon the Crown attorneys from time to time.

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[1] A small number of prosecutions are conducted by private prosecutors and federal prosecutors.

[2] *The Crown Attorneys Act*, R.S.O. 1970, c. 101.

[3] Bull, "*The Career Prosecutor of Canada*", (1962), 43 J.Crim. L. 89.

[4] *An Act Respecting County Attorneys* (cited as *The Local Crown Attorneys' Act*), C.S.U.C. 1859, c. 106.

[5] *Ibid.* s. 1 Secondly—He shall institute and conduct on the part of the Crown prosecutions for felonies and misdemeanors at the Court of Quarter Sessions for the County he is appointed to, in the same manner as the Law Officers of the Crown institute and conduct similar prosecutions at the Assizes . . .

Fifthly—If required by the general regulations touching his office to be made in pursuance of the provisions hereinafter contained he shall institute and conduct proceedings before Justices of the Peace under any Act or law conferring summary powers to convict for offences in relation to the Public Revenue, the Public Property, the Public Domain, the Public Peace, the Public Health, and any other matter made punishable on summary conviction before Justices of the Peace, and the County Attorney is hereby empowered to institute such proceedings, on a complaint in writing, or as Public Prosecutor, in cases wherein the public interests require the exercise of such office.

The establishment of the office of public prosecutor in Ontario was predated by the creation of similar institutions in Scotland and Ireland, continental Europe and in the American colonies. A brief resume of the systems for conducting public prosecutions in these jurisdictions and in England, where there has been no office comparable to that of Crown attorney, is contained in Appendix I. It has been suggested that the influx of American loyalists after the War of Independence influenced the decision in Ontario to create appointive rather than elective offices.[6] It may be that the concept of the office has its origins in jurisdictions which were the homelands of many early settlers.

Provision has been made in the other Canadian provinces for agents of the Attorney General with similar duties. British Columbia is an exception. There, organized municipalities and regions have the right to appoint local prosecutors. The duties they perform, however, are not unlike those of Crown attorneys in other provinces.

B. Functions and Duties of Crown Attorneys

1. *Prosecutorial*

The *British North America Act* confers on the Province the exclusive power to make laws in relation to

> The Administration of Justice in the Province including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.[7]

Exclusive authority is conferred on the Parliament of Canada to make laws in relation to

> The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.[8]

Within this constitutional framework both the Attorney General of Canada and the Attorney General for Ontario as chief law officers of the Crown have powers and duties with respect to the matters within their respective legislative jurisdictions. The *Department of Justice Act* provides:

> The Attorney General of Canada shall be entrusted with the powers and charged with the duties that belong to the office of the Attorney General of England by law or usage, so far as those powers and duties are applicable to Canada, and also with the powers and duties that, by the laws of the several provinces, belonged to the office of attorney general of each province up to the time when the *British North America Act, 1867*, came into effect, so far as those laws under the

[6]Bull, *op. cit.* n. 3 *supra*, at p. 90.
[7]Section 92(14).
[8]*B.N.A. Act*, s. 91(27).

provisions of the said Act are to be administered and carried into effect by the Government of Canada.[9]

The Ministry of the Attorney General Act[10] provides:

> The Minister, . . . shall perform the duties and have the powers that belong to the Attorney General and Solicitor General of England by law or usage, so far as those duties and powers are applicable to Ontario, and also shall perform the duties and have the powers that, up to the time of the *British North America Act, 1867* came into effect, belonged to the offices of the Attorney General and Solicitor General in the provinces of Canada and Upper Canada and which, under the provisions of that Act, are within the scope of the powers of the Legislature.

Responsibility for the conduct of most prosecutions under the *Criminal Code* is imposed chiefly on the Attorney General for Ontario under section 92(14) of the *British North America Act*. The Attorney General of Canada, however, has in practice conducted most, if not all, prosecutions under federal statutes such as the *Narcotic Control Act*, the *Income Tax Act*, the *Combines Investigation Act*, the *Customs Act*, the *Excise Tax Act* and the *Unemployment Insurance Act*.[11]

In the exercise of its jurisdiction under section 92(14) of the *British North America Act* the Province has enacted *The Crown Attorneys Act*[12] constituting every Crown attorney the statutory agent of the Attorney General for the purposes of the *Criminal Code*[13] and imposing on Crown attorneys the general duty to "aid in the local administration of justice".[14] More specifically, the Crown attorney is to perform all duties that are assigned to Crown attorneys under the laws in force in Ontario and to:

> (b) conduct, on the part of the Crown, preliminary hearings of indictable offences and prosecutions for indictable offences,
> (i) at the sittings of the Supreme Court where no law officer of the Crown or other counsel has been appointed by the Attorney General,
> (ii) at the court of general sessions of the peace,
> (iii) at the county or district court judges' criminal court, and
> (iv) before provincial judges in summary trials of indictable offences under the *Criminal Code* (Canada),

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[9]R.S.C. 1970, c. J-2, s. 5(a).

[10]R.S.O. 1970, c. 116, s. 5(d) renamed by S.O. 1972, c. 1, s. 9(1).

[11]The recent decision of Vannini, D.C.J. in *R.* v. *Collins*, [1973] 1 O.R. 510 explores extensively the history of the office of Attorney General and the constitutionality of the definition of Attorney General in s. 2(b) of the *Criminal Code*. The section confers on the Attorney General of Canada (or his agent or anyone with his written consent) the exclusive jurisdiction to prefer indictments under s. 496(1) of the *Criminal Code* in respect of proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government in respect of any violation of or conspiracy to violate any other Act of the Parliament of Canada or a regulation made thereunder.

[12]R.S.O. 1970, c. 101.

[13]*Ibid.* s. 11.

[14]*Ibid.* s. 12.

in the same manner as the law officers of the Crown conduct similar prosecutions at the sittings of the Supreme Court, and with the like rights and privileges, and attend to all criminal business at such courts;

(c) where a law officer of the Crown or other counsel has been appointed by the Attorney General, deliver to the Crown officer or other counsel all papers connected with the criminal business at the sittings of the Supreme Court before the opening of the court and, if required, be present at the court and assist the Crown officer or other counsel;

(d) watch over cases conducted by private prosecutors and, without unnecessarily interfering with private individuals who wish in such cases to prosecute, assume wholly the conduct of the case where justice towards the accused seems to demand his interposition;

(e) where in his opinion the public interest so requires, conduct proceedings in respect of any offence punishable on summary conviction;

(f) when requested in writing, cause prosecutions for offences against any Act of the Legislature to be instituted on behalf of any governmental department or agency and conduct such prosecutions to judgment and to appeal, if so instructed;

(g) where in his opinion the public interest so requires, conduct appeals to the county or district court for offences punishable on summary conviction.[15]

In accordance with the statutory prescription, Crown attorneys conduct all preliminary inquiries before Provincial judges, and most trials of indictable offences before Provincial judges including those that may be tried summarily on the election of the Crown. Crown attorneys customarily assume full responsibility for the conduct of prosecutions under the *Criminal Code* in the General Sessions of the Peace, the County Court Judges' Criminal Courts and in the Assizes, although departmental law officers or other members of the bar are occasionally instructed by the Attorney General to appear on his behalf at an Assize to prosecute a case which has no locus within a county or is particularly complicated.[16]

In summary conviction matters responsibility for prosecutions is fragmented. This confusing pattern emerges. Where an offence arises under Part XXIV of the *Criminal Code* or is one which is punishable summarily at the election of the accused, the Crown attorney usually prosecutes. When an offence punishable on summary conviction arises under a provincial statute, a police officer, not a Crown attorney, usually conducts the prose-

[15]*Ibid.* s. 12(b)-(g) as amended by S.O. 1972, c. 1, s. 1.

[16]For the statutory limitations on the right to conduct prosecutions of indictable offences under the *Criminal Code* see the definition of prosecutor in s. 2 and the manner of preferring an indictment (the documentary basis of prosecutions in the superior courts) in ss. 496 and 505. Informations (the documentary basis of prosecutions in the Provincial Courts) are usually sworn to by police officers or private citizens who institute the proceedings.

cution.[17] Certain divisions of government departments such as Corporations Tax, Health and Agriculture employ departmental solicitors who are instructed to conduct prosecutions involving departmental legislation. Responsibility for the prosecution of municipal by-law offences frequently is assumed by members of the municipality's legal staff. In Toronto, offences under *The Liquor Control Act* and *The Liquor Licence Act* are prosecuted by an official known as the City Prosecutor. All prosecutions under provincial legislation which are not conducted by Crown attorneys continue to come under their general supervision by law.[18]

Crown appeals in summary conviction matters in practice are both instituted and conducted by Crown attorneys, while appeals of judgments in indictable matters are usually conducted by the legal staff within the Ministry of the Attorney General.

An assistant Crown attorney has been assigned on a full-time basis to the Provincial Court (Family Division) in the Judicial District of York where he prosecutes many cases and advises on others. Outside the Judicial District of York there is no uniform practice with respect to the appearance of Crown attorneys in the Provincial Courts (Family Division).

Crown attorneys are required to prepare and prefer indictments in proceedings before grand juries. If our recommendations made in chapter 12, Part I for the abolition of the grand jury are adopted, Crown attorneys will be relieved of this task.

In addition to the provisions of *The Crown Attorneys Act* imposing the general duty on the Crown attorney to prosecute, a number of other provincial statutes impose a specific duty on the Crown attorney to conduct prosecutions of offences under them. Examples such as *The Fire Marshals Act* and *The Liquor Control Act* may be found in Appendix III.

It would appear that the status of private prosecutors to conduct prosecutions of summary conviction offences is limited by the provisions of *The Crown Attorneys Act* which impose on Crown attorneys the responsibility to supervise prosecutions and assume wholly the conduct of cases where justice towards the accused seems to demand interposition.[19] It is questionable whether this provision can have any application in summary conviction proceedings under the *Criminal Code* where an informant relies on his entitlement under section 737(1) to conduct his case personally. It has been held that while a private person may prosecute at the summary trial of an indictable offence and a preliminary inquiry, he cannot conduct further proceedings following a committal for trial by a judge without a jury unless he can induce the Attorney General to intervene or unless he has his written consent; and that on trials by judge and jury he requires leave of the court or Attorney General.[20] It has also been judicially de-

[17]For the statutory authority for the conduct by the informant of summary conviction prosecutions under the *Criminal Code* see s. 737 and the definition of "prosecutor" and "informant" in s. 720(1).

[18]*The Crown Attorneys Act*, R.S.O. 1970, c. 101, s. 12(e).

[19]*Ibid.* s. 12(d).

[20]*R.* v. *Schwerdt* (1957), 119 C.C.C. 81.

termined that at such a trial or preliminary inquiry the Attorney General or his agent is entitled to intervene and to withdraw the charge in the case of an information for an indictable offence.[21]

Incidental to the Crown attorney's functions as prosecutor are his exclusive right to determine what charges are to be maintained against an accused person,[22] his right to determine with respect to certain offences whether to prosecute by way of indictment or summary conviction[23] and his right to withdraw charges once laid.[24]

The importance of the Crown attorney's prosecutorial duties was expressed by the late Mr. Justice Rand in *R.* v. *Boucher* in the following terms:

> The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility.[25]

2. *Advisory*

(a) *Advice to the Police*

The Crown attorney in the community is a quasi-judicial officer, who performs many duties in addition to prosecuting cases. The office is one that should be highly respected and those who fill it should conduct themselves to merit respect. In Ontario, this is usually the case.

Crown attorneys perform an important function in advising members of the public and the police concerning proposed prosecutions or prosecutions that have been instituted. They advise the police not only on cases immediately coming before the courts, but also on general procedural matters, investigations and the preparation of cases not immediately before the courts. In the smaller centres, the Ontario Provincial Police and the municipal police seek the advice of Crown attorneys concerning what charges if any should be laid in respect of particular fact situations. In northern Ontario, the police are especially dependent on Crown attorneys.

In Metropolitan Toronto, and to a lesser degree in the larger centres, the police in most cases determine in the first instance what charges should be laid, but advice as to the propriety of the charges as the cases develop is the responsibility of the Crown attorney.

Although there is no statutory obligation to advise the police, it is assumed that this is a proper function of the office. Much reliance is placed on the advice and assistance of Crown counsel at the Police College in Toronto and the Ontario Police College at Aylmer. A member of the Crown Attorneys' Association is an official representative to the latter.

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[21] *R.* v. *Leonard, ex parte Graham* (1962), 133 C.C.C. 262.
[22] *R.* v. *Blahut et al.* (1954), 110 C.C.C. 75.
[23] *R.* v. *Wright*, [1964] 1 C.C.C. 365.
[24] *R.* v. *Garcia et al.*, [1970] 3 C.C.C. 124.
[25] *R.* v. *Boucher*, [1955] S.C.R. 16, at p. 23.

(b) *Advice to Justices of the Peace*

The Crown attorney is under a statutory obligation to aid in the local administration of justice[26] and to advise the justices of the peace "with respect to offences against the laws in force in Ontario".[27] The meaning of this provision is not clear. If it is intended to mean that the Crown attorney is to advise justices of the peace with respect to the performance of their judicial duties in specific cases it is bad in principle. If, on the other hand, it is intended to mean that the Crown attorney is required to be a sort of legal tutor to the justices of the peace it is equally bad in principle. As we indicated in the previous chapter, both these duties should be performed by Provincial judges. It may well be that Crown attorneys should participate in some way in the legal education of justices of the peace but it is not consistent with our concept of the independence of the judiciary in the administration of justice that they should advise the justices of the peace in specific cases.

There may be areas, however, where it may be proper for the Crown attorney to advise the justice of the peace on matters of form, e.g. whether an information as laid discloses any offence or whether a matter is within the jurisdiction of the justice of the peace and in matters of practice and procedure.

(c) *Advice to Members of the Public*

The Crown attorney is called upon to advise members of the public in a multitude of matters related to the administration of the criminal law and the provincial laws. In the Crown attorney's office, particularly in smaller communities, there is invariably a welter of complaints that have to be sorted out to determine whether a matter is one in which the Crown attorney should intervene or whether it is one for the civil law or private prosecution. The function that a good Crown attorney performs in a community, quite apart from his duties as a prosecutor, is a most important one. His office is not only a symbol of the authority of the law but a talisman of the protection of the law. For these reasons we believe that whatever moves are made toward regionalization of the administration of justice, a Crown attorney should continue to be appointed for each county or district where his assistance and advice will remain most accessible to the members of the public and to the local police services.

3. *Under The Coroners Act*

The Commission in its Report on the Coroner System in Ontario recommended that the principle of mandatory consultation between the coroner and Crown attorney be given legislative recognition.[28] Under the existing *Coroners Act*, the Crown attorney exercises certain preinquest powers of operational control. These powers include the ordering of the holding of an inquest;[29] preventing the transfer of an investigation from

[26]R.S.O. 1970, c. 101, s. 12.
[27]*Ibid.* s. 12(h).
[28]*Report on the Coroner System in Ontario*, 103 (1971).
[29]*The Coroners Act*, R.S.O. 1970, c. 87, s. 12.

one coroner to another;[30] and, after the issue of a warrant by a coroner to take possession of a body, instructing another coroner to take action.[31]

We concluded that there should be mandatory consultation with Crown attorneys on these matters but that the Act should not confer power to go beyond consultation. Power to direct and intervene in a coroner's case should be vested only in the Provincial Chief Coroner and in the Attorney General.[32]

The Coroners Act now in force also confers certain powers and responsibilities on Crown attorneys with respect to the conduct of inquests:

(a) The Crown attorney may attend any inquest and must if directed to do so by the Attorney General.[33]

(b) The Crown attorney may examine and cross-examine witnesses,[34] and may direct that particular persons be summoned as witnesses by the coroner.[35]

(c) The Crown attorney must give his consent before an inquest may be held without a jury in a provisional judicial district,[36] and must approve of any appointments of persons by the coroner to record evidence at the inquest.[37]

(d) The Crown attorney may order that the evidence be transcribed,[38] and may also require that an interpreter be employed by the coroner at the inquest.[39]

(e) Finally, the Crown attorney is designated under *The Coroners Act* as the officer to whom the coroner must transmit the verdict of the jury.[40]

In our Report on Coroners we concluded that these are all functions appropriate to be performed by Crown attorneys to provide coroners with access to legal skills where desirable and proper legal direction where necessary.[41]

We found that attendance of Crown attorneys at inquests was irregular, and that in some counties including the Judicial District of York attendance was the exception rather than the rule.[42] (Appendix II contains data made available to us in this project, showing attendance by Crown attorneys at inquests for the period April to December, 1971.)

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[30] *Ibid.* s. 15.
[31] *Ibid.* s. 10(3).
[32] *Op. cit.* n. 28 *supra*, at p. 65.
[33] R.S.O. 1970, c. 87, s. 25(1).
[34] *Ibid.*
[35] *Ibid.* s. 26(1).
[36] *Ibid.* s. 27(4).
[37] *Ibid.* s. 33(1).
[38] *Ibid.* s. 33(2)
[39] *Ibid.* s. 34.
[40] *Ibid.* s. 36.
[41] *Op. cit.* n. 28 *supra*, at p. 104.
[42] *Ibid.*

Our conclusion was that the need for proper legal counsel at inquests would be immediate and extensive if a new coroners act were passed and that the voluntary attendance of Crown attorneys be discontinued in favour of compulsory attendance at the request of the presiding officer.[43] We recommended that the Crown attorney retain his duties under section 36 of *The Coroners Act* with respect to exhibits at inquests but that the section be recast to place the responsibility on the Chief Coroner for duplicating and circulating copies of verdicts.

The Coroners Act, 1972,[44] which has not yet been proclaimed in force, embodies most of our recommendations. The provisions of that Act make it mandatory for Crown attorneys to attend all inquests.[45]

4. *As Clerk of the Peace*

The office of clerk of the peace goes back to the birth of British institutions in Upper Canada. It was originally related to the functions and duties of the justices of the peace sitting in the Quarter Sessions of the Peace. These functions and duties covered a very wide range of subject matter. They extended from exercising jurisdiction in criminal cases to empowering the certification of the clergy of the Church of Scotland to perform marriages,[46] appointing constables,[47] nominating parish town officers where no town meeting had been held,[48] and appointing surveyors.[49]

In the several statutes conferring jurisdiction on the Quarter Sessions of the Peace there is reference to the clerk of the peace as one who performed administrative duties but nowhere in either the ancient or modern statutes have we been able to find any express statutory authority for the office. It is interesting that in 1859 in the Province of Upper Canada, clerks of the peace were required to be barristers of not less than three years' standing. They were *ex officio* County attorneys for the county to which they were appointed.[50]

The clerk of the peace had many other duties imposed on him. For example, the publication of notices concerning the forfeiture of the estates of aliens and traitors[51] and making out writs to the sheriff for levying arrears and assessments.[52]

It is unnecessary to pursue further the history of the office. It is sufficient to say that it appears to have been engrafted onto the law of Ontario by adoption and custom rather than statutory authority. We are concerned here with the office as it relates to Crown attorneys. Section 6 of *The Crown Attorneys Act* provides:

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[43]*Ibid.* p. 105.
[44]S.O. 1972, c. 98.
[45]*Ibid.* s. 24.
[46]38 Geo. III, c. 14, s. 2.
[47]33 Geo. III, c. 2, s. 10.
[48]46 Geo. III, c. 5, s. 2.
[49]50 Geo. III, c. 1, s. 11.
[50]C.S.U.C. 1859, c. 106, s. 7.
[51]59 Geo. III, c. 22, s. 6.
[52]6 Geo. IV, c. 1, s. 7.

(1) Except in the Judicial District of York, every Crown attorney is *ex officio* clerk of the peace for the county or district for which he is Crown attorney.

(2) In the Judicial District of York, the offices of Crown attorney and clerk of the peace may be held by different persons.

(3) Where the offices of Crown attorney and clerk of the peace are held by the same person, the duties that the clerk of the peace is required to perform in the courtroom during the sittings of the court of general sessions of the peace and of the county or district court judges' criminal court shall be performed by the clerk of the county or district court.

Until the recent retirement of the Clerk of the Peace for the Judicial District of York, the Crown attorney has not acted as clerk of the peace. Since his retirement no one has been appointed to fill that office and the Crown attorney now performs the duties attached to the office as do all other Crown attorneys in Ontario, and the traditional duties that were previously performed by the clerk of the peace as Clerk of the General Sessions of the Peace and County Court Judges' Criminal Court are now to be performed throughout Ontario by the clerks of the County and District Courts.

Under section 2 of the *Criminal Code*, "Clerk of the Court" includes "a person by whatever name or title he may be designated who from time to time performs the duties of the Clerk of the Court". Duties are imposed on the Clerk of the Court under several sections of the Code, particularly section 490 concerning the election to be tried by a judge without a jury and section 549 concerning procedure where an indictment is found against a corporation. Other important duties are imposed on the Clerk of the Court with respect to forfeiture of recognizances under Part XXII of the *Criminal Code*. In the Schedule to Part XXII, the "Clerk of the Court" is defined to mean in Ontario the "Clerk of the Peace" for the Court of General Sessions of the Peace in respect of a recognizance for the appearance of a person before that court, a judge acting under Part XVI, a justice or a magistrate.[53]

The County Court Judges' Criminal Courts Act provides that "the clerk of the peace for the county or district court is the clerk of the court constituted under this Act".[54] The result of this strange legislative tangle is that the Crown attorney is the Clerk of the General Sessions of the Peace and of the County Court Judges' Criminal Court but the duties are performed by the clerk of the County Court. It follows that this statutory circumlocution can be avoided by simply conferring on the clerk of the County and District Court the powers and duties of the clerk of the peace. The office of the clerk of the peace should be abolished unless there are compelling reasons to maintain it because of the duties required to be performed by the holder of the office under other statutes.

[53] *Criminal Code*, s. 696(1).
[54] R.S.O. 1970, c. 93, s. 1(3).

Under *The Coroners Act*[55] the Inspector of Legal Offices is required to send a certified copy of an Order-in-Council appointing a coroner to the clerk of the peace of the county or district in which the coroner is to act and it shall be filed by him in his office. For the purpose of record, it would be equally convenient to have the order filed with the County or District Court clerk. It would, however, be convenient to have an additional copy sent to the Crown attorney by reason of his concern in matters coming within *The Coroners Act*.

Under *The Small Claims Courts Act*[56] the clerk of the peace is required to perform duties and assume responsibility which could be equally well performed by the County or District Court clerk. These duties, which include acting as *pro tem* clerk of the Small Claims Court when that office is vacant, are not duties that ought to be performed by the Crown attorney.

The Estreats Act[57] is complementary to Part XXII of the *Criminal Code*. It is concerned with the procedure attendant on the forfeiture of recognizances given as security for the appearance of persons before the court. In other jurisdictions the duties imposed on the clerk of the peace under this Act are performed by the clerks of the respective courts.

Under *The Judicature Act*[58] a Notice of Motion to quash a conviction shall be served upon the clerk of the peace if the proceedings have been returned to his office.

The Jurors Act[59] provides:

> The clerk of the peace shall attend all meetings of the county selectors and shall enter their proceedings and resolutions in a book kept for that purpose, *but he shall have no voice in the selection of jurors* and *shall not advise or express an opinion whether any name ought to be placed upon or omitted from the list of jurors.* [Emphasis added.]

The clerk of the peace has other duties under *The Jurors Act*. Section 10 provides that the annual meeting of the county selectors shall be held either in the courthouse or in the office of the clerk of the peace. He is required to produce for the county selectors copies of the voters' lists delivered to him by the clerks of the local municipalities, and to transmit copies of their resolutions determining the number of jurors to be drafted to the appropriate courts.[60]

Section 59(8) of *The Municipal Act*[61] enacts that a by-law establishing a polling subdivision shall be filed by the municipal clerk with the clerk

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[55]R.S.O. 1970, c. 87, s. 4. See also *The Coroners Act, 1972*, S.O. 1972, c. 98, s. 3(6) not yet proclaimed in force.
[56]R.S.O. 1970, c. 439, ss. 10, 25, 48 and 50.
[57]R.S.O. 1970, c. 150.
[58]R.S.O. 1970, c. 228, s. 69.
[59]R.S.O. 1970, c. 230, s. 9.
[60]*Ibid.* ss. 12, 13.
[61]R.S.O. 1970, c. 284.

of the peace and section 85(2) that the list of voters may be procured from the clerk of the peace.

Section 3 of *The Private Sanitaria Act*[62] provides that the clerk of the peace is a member of the board of visitors and that he is the secretary of the board. The oaths of office of the members of the board are to be filed with the clerk of the peace. Section 6 provides for licence fees to be paid to the clerk of the peace and section 7 that the clerk of the peace shall keep all the accounts. Other duties of a similar nature are found in the Act.

Section 15 of *The Summary Convictions Act*[63] is as follows:

> Every justice shall forthwith after making a conviction or order or an order of dismissal transmit to the clerk of the peace for the county or district the conviction or order or order of dismissal together with the information, depositions and other papers relating to the case and any recognizances in respect of which proceedings are required to be taken in the court of general sessions of the peace.

Section 6 of *The Bailiffs Act*[64] provides that an application for appointment as a bailiff shall be made to the clerk of the peace in the county in which the applicant intends to carry on business. Section 7 charges the clerk of the peace to examine the applicant and his recommendations are to be sent to the Registrar of Collection Agencies under *The Collection Agencies Act*. Any person who has a complaint against a bailiff may make his complaint to the clerk of the peace in the county for which the bailiff is appointed. The clerk of the peace then investigates the complaint and makes a report to the Registrar.[65]

It can be seen that the duties of clerk of the peace are essentially of an administrative and clerical nature, unrelated to the functions performed by Crown attorneys as agents of the Attorney General. No doubt most of the duties were assigned to Crown attorneys as clerk of the peace as a convenience at a time when many officials in the administration of justice held multiple offices. These functions are not of such a nature as require performance or supervision by officers with the high degree of skill and training which should be possessed by Crown attorneys. It is a misuse of their talents to impose on them routine duties not directly associated with their primary responsibilities.

It was the view of the Crown attorneys who appeared before the Commission that they should be relieved of these duties, and particularly that it was not desirable that the Crown attorney should in any way be engaged in the selection of juries. Although he has no voice in the selection, the fact that he is present at the meetings of the county selectors is open to misunderstanding by the public.

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[62]R.S.O. 1970, c. 363.
[63]R.S.O. 1970, c. 450.
[64]R.S.O. 1970, c. 38.
[65]*Ibid.* s. 10 as amended by S.O. 1971, Vol. 2, c. 50, s. 10(6).

Insofar as estreats are concerned, the Crown attorney should represent the Crown on an application for the forfeiture of security for non-appearance of the person bound to appear, but other than that, the duties under the Act such as preparation of the roll of fines and forfeited recognizances may be performed by the clerk or registrar of the appropriate court.

We recommend that most functions of the clerk of the peace be performed by the County Court clerk and that Crown attorneys cease to be *ex officio* clerks of the peace. Under particular statutes where the nature of the subject matter makes it appropriate for the clerk or registrar of another court to perform certain duties, the duties should be specifically imposed on such other officer.

5. *Other Duties of Crown Attorneys*

Appendix III contains a summary of statutes imposing miscellaneous duties on Crown attorneys. Many of these duties are essentially of an administrative and clerical nature and might be performed more appropriately by other officials. For example, the responsibility for employing interpreters at trials and inquests imposed by *The Administration of Justice Act*[66] might be transferred to local court administrators to be performed under the direction of the Provincial Director of Court Administration.[67] Similarly, the authorization for the payment of additional witness fees and fees where no trial takes place under *The Crown Witnesses Act*[68] might be given by an official whose duties are primarily administrative and who reports to the Provincial Director of Court Administration.

Two other statutes impose on Crown attorneys the duties of other full-time officers in the administration of justice when these offices are vacant. *The Judicature Act*[69] constitutes the Crown attorney *pro tempore* local registrar, county court clerk or surrogate registrar where the office is vacant by reason of death, suspension, resignation, retirement or removal where there is no deputy officer to fill the position. *The Sheriffs Act*[70] provides that the Crown attorney is *pro tempore* sheriff when the office becomes vacant and there is no deputy sheriff. It is difficult to see what relief is provided by these enactments even in the case of unexpected vacancies. Crown attorneys are fully occupied performing the essential functions entrusted to them. They have no special knowledge of the operations of offices of local registrars, county court clerks, surrogate registrars or sheriffs which qualify them to perform their duties. In some cases the functions may place Crown attorneys in a position of conflict of interest, for example, if they were required to participate in the jury selection process in the absence of the sheriff who is required to perform an important role. These provisions should be repealed and other provision made.

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[66]R.S.O. 1970, c. 6, s. 5.

[67]The creation of this office was recommended in Part I, chapter 2 of this Report. For our recommendations concerning court interpreters see Part III of this Report.

[68]R.S.O. 1970, c. 103 as amended by S.O. 1971, Vol. 2, c. 5.

[69]R.S.O. 1970, c. 228, s. 88(2).

[70]R.S.O. 1970, c. 434, s. 21(2).

C. Status

1. *Appointment*

The Crown Attorneys Act establishes a framework for the appointment and supervision of Crown attorneys in the exercise of their duties. As we have already observed, the Act is not exhaustive of the statutory provisions affecting that office. The Lieutenant Governor in Council may appoint a Crown attorney for each county and each provisional judicial district and such Crown attorneys and assistant Crown attorneys for the Province as he considers necessary. The Crown attorneys and assistant Crown attorneys so appointed are to act anywhere in the Province as directed by the Director of Public Prosecutions.[71] The Lieutenant Governor in Council may also appoint one or more assistant Crown attorneys for any county or provisional judicial district to act under the direction of the Crown attorney.[72] When so acting, such assistant Crown attorneys have the same powers and are to perform the same duties as the Crown attorneys.

In the Judicial District of York, provision is made for the appointment of a Crown attorney, deputy Crown attorney and such assistants as the Lieutenant Governor in Council deems necessary.[73] The deputy and assistants are to act under the direction of the Crown attorney and when so acting have the like duties and powers as the Crown Attorney for the Judicial District of York.[74]

There is a statutory requirement that any officer so appointed and anyone acting in the capacity of Crown attorney or assistant Crown attorney must be a member of the Ontario bar.[75] The appointment of *pro tem* or part-time Crown attorneys will be discussed later.

Both *The Crown Attorneys Act*[76] and *The Public Officers' Fees Act*[77] contemplate that the appointment of Crown attorneys may be on a fee rather than a salary basis. We understand that four Crown attorneys (as set out in Table I, Section D) now hold appointments on a fee basis. In our opinion it is not proper to countenance in the high office of Crown attorney an interest in promoting prosecutions that a fee system tends to create. The provisions regulating appointments on a fee basis should be repealed.

The Crown attorney, who is the agent of the Attorney General for the purposes of the *Criminal Code*, is an employee of the Ministry of the Attorney General, which is organized for the purposes of enabling the Attorney General to carry out the duties and functions of his office.[78]

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[71] R.S.O. 1970, c. 101, s. 1. Bill 4 (given first reading March 21, 1973) amending *The Crown Attorneys Act* substitutes Deputy Attorney General for Director of Public Prosecutions, which office ceases to exist.

[72] *Ibid.* s. 2.

[73] *Ibid.* s. 3(1).

[74] *Ibid.* s. 3(2).

[75] *Ibid.* s. 4.

[76] *Ibid.* ss. 7, 14, 16.

[77] R.S.O. 1970, c. 383, s.5.

[78] See *The Ministry of the Attorney General Act*, ss. 3(1), 6 as amended by S.O. 1972, c. 1, s. 9.

Crown attorneys and assistant Crown attorneys are at present appointed to act under the direction of the Director of Public Prosecutions, an employee of the Ministry of the Attorney General with responsibility for supervising and coordinating criminal prosecutions in the Province and the Crown Attorney System.[79] Legislation has been introduced to abolish the office of Director of Public Prosecutions. Replacing it is the office of Director of Crown Attorneys charged with the responsibility for direction of all Crown attorneys and liaison between them and the Ministry of the Attorney General. Advisory and litigation services to Crown attorneys in criminal matters are to be provided by the Senior Crown Counsel in charge of Criminal Appeals and Special Prosecutions.

The statutory provisions governing the status and conditions of employment of Crown attorneys are not to be found in *The Crown Attorneys Act* but in *The Public Service Act*. During their first year of employment assistant Crown attorneys are usually appointed to the probationary staff and may be released by the Deputy Attorney General for failure to meet the requirements of the position.[80] The Crown attorney is asked to assess the assistant's performance and capabilities during the probationary period and to make recommendations to the Deputy Attorney General for permanent appointment.

Permanent positions in the Crown attorney service are classified within the Legal Officer Series, which consists of a range of eight levels established by a legal Positions Evaluation and Classification Committee composed of the Deputy Minister of the Department of Civil Service, the Deputy Attorney General and an Assistant Deputy Attorney General or their respective nominees. A salary grid has been developed within each level. Allocations to the first three levels within the series are the responsibility of the Deputy Attorney General. Allocations to positions above level three are made only on the recommendation of the Deputy Attorney General following evaluation and appraisal of the candidate by the Legal Positions Evaluation and Classification Committee.

The eight levels are as follows:

Legal Officer 1

An entry level with provision for use as a working level for solicitors who demonstrate they have reached the limit of their potential.

Legal Officer 2

An entry and working level for employment in the Ontario Civil Service of more experienced solicitors and the level to which solicitors classified as Legal Officer 1 may proceed when they have demonstrated potential for promotion.

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[79]Province of Ontario, Manual of Administration, Vol. 1, Supplement to O.C. #12, Department of Justice, [April 1971]. But see Bill 4 (given first reading March 21, 1973) amending *The Crown Attorneys Act* to substitute Deputy Attorney General for Director of Public Prosecutions.

[80]R.S.O. 1970, c. 386, s. 22(5).

Legal Officer 3

A senior working level and the level to which solicitors may progress solely on the recommendation of the Deputy Minister on the basis of responsibility and superior performance.

Legal Officer 4

A higher working level, allocation to which is dependent upon a favourable review of the position in relation to the classification factors, by the Legal Positions Evaluation and Classification Committee.

Legal Officer 5

The first level for senior positions. Progression to this level is achieved only following evaluation and appraisal of the work performed and the professional capabilities of the incumbent by the Legal Positions Evaluation and Classification Committee.

Legal Officer 6

The second level for senior positions. Progression to this level is achieved only following evaluation and appraisal of the work performed and the professional capabilities of the incumbent by the Legal Positions Evaluation and Classification Committee.

Legal Officer 7

The level to cover senior solicitors, who by reason of the workload and outstanding competence as evaluated by the Legal Positions Evaluation and Classification Committee, justify a differential in compensation above that of Legal Officer 6.

Legal Officer 8

Represents the most senior (in terms of ability, status, reputation and contribution) level solicitors in the service of the Government of Ontario. Evaluation of the incumbent for recommendation for allocation to this level will be made by the Legal Positions Evaluation and Classification Committee.

The Legal Officer Series specifically applies to:

(a) Members of the Law Society of Upper Canada employed as civil servants in the Crown Law Office and other branches, boards and commissions of the Department of Justice in positions such as: Crown Counsel, Crown Solicitor, Crown Attorney, Assistant Crown Attorney, Associate Legislative Counsel, Registrar of Regulations and Law Research Officer.

(b) Members of the Law Society of Upper Canada employed as civil servants in positions of heads of legal branches, crown counsel and/or solicitor in Ontario government departments and other agencies administered within the provisions of *The Public Service Act*.

Excluded from the series are:

(a) Judicial and quasi-judicial positions such as: Provincial judges, Masters and members of administrative, investigative and research boards and commissions, etc.

(b) Positions at the level of Deputy Minister, Assistant Deputy Minister, Executive Director or Senior List positions, whether or not membership in the Law Society of Upper Canada is mandatory in order to hold such position.

(c) Positions with predominantly administrative responsibilities that may require the interpretation and administration of legislation, the drafting of contracts, leases or other legal documents or the conduct of studies and for which a comprehensive knowledge of law is desirable but not necessarily membership in the Law Society of Upper Canada.

Positions with incumbents who are not members of the Law Society of Upper Canada are excluded from the series.

The structure and allocation considerations are stated to be:

> The Legal Officer series consists of eight levels of professional development and responsibility represented by eight classes with eight salary ranges. Allocation to specific levels is based on a process whereby both the work performed and responsibilities assigned plus the personal and professional qualities of the incumbent are evaluated and appraised by the Legal Positions Evaluation and Classification Committee. Following are some of the factors considered by the Committee in classifying positions and incumbents in the series.
>
> (a) *Duties and Responsibilities*
>
> (i) For legal officers in the Department of Justice [now the Ministry of the Attorney General] the responsibility for directing and supervising the work of other legal officers and the nature, type, level and quality of the work performed.
>
> (ii) For Crown attorneys, workload, courts served and law enforcement agencies involved and the nature, type, level and quality of the work performed.
>
> (iii) For legal officers in operating departments, the size of the department, the number of its programs and the nature, type, level and quality of the work performed.
>
> (b) *Personal Qualities*
>
> The degree of:
>
> (i) ability to recognize and analyze legal problems and provide effective solutions;
>
> (ii) ability to exercise sound judgment in the advice rendered to the Government in a manner consistent with justice and equity;
>
> (iii) ability to exercise the judgment necessary to maintain and protect the interests of the Government and the public and at the same time protect the rights of the individual;

(iv) ability to cooperate with those advised and the ability to secure the cooperation of these persons;
(v) evidence of dedication to the principles of the administration of justice and the law; and
(vi) demonstrated understanding and acceptance of the responsibilities of a public servant.

The Committee's brochure on the series contains the following comment with respect to the classified positions:

> As can be seen from the foregoing the classification of legal officer positions is a departure from the practice of classifying the job, in that an effort is made to evaluate and appraise the professional responsibilities and capabilities of the individual as well as the work performed and job responsibilities, plus, the individual's contribution first to the department and second to the government.

In practice, the reclassification of assistant Crown attorneys depends substantially on the Crown attorney's evaluation. Regulations under *The Public Service Act* provide for terms of employment and collateral benefits such as pension schemes, vacations, etc.

Under our system of government, the Attorney General occupies an office that has characteristics that do not pertain to that occupied by any other Minister of the Crown insofar as he is responsible for that part of law enforcement which involves the prosecution of offenders. He must administer his office free from political considerations or cabinet control as the Queen's attorney and his decisions must be based on that fact. He is, however, accountable to the Legislature for his decisions.[81]

Every Crown attorney is the agent of the Attorney General for the purposes of the *Criminal Code*. The many other statutory duties imposed on Crown attorneys are incidental to the matters we are discussing in this chapter. We have recommended that many of these duties be assigned to others. We are concerned here only with the status of the Crown attorney in the government service and in the community.

The office held by the Crown attorney is very different from that held by a departmental solicitor and it requires different qualifications. He is a counsel conducting cases in court in our adversary system. He may be pitted against outstanding members of the bar who will draw a fee for a day's work that will be as great as the Crown attorney's salary for a month. The drain put on the physical resources of Crown counsel who is diligent in his work is much greater than on those whose work is done in offices.

It is our view that recognition of the unique position of Crown attorneys in the public service should be reflected in *The Crown Attorneys Act*. That Act or regulations made pursuant thereto should provide for specifications for appointment and advancement in the public service on the basis of work performed and importance in the local context. The range of classification for Crown attorneys and assistant Crown attorneys should be set up independently of the Legal Officer Series and should not be as broad.

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[81]For a full discussion of the office of Attorney General see the McRuer Commission Report 931 ff. (Report No. 1 Vol. 2, 1968).

All other provisions of *The Public Service Act* should be reviewed and only those which adequately govern the conditions of employment of Crown attorneys should be retained to supplement *The Crown Attorneys Act*.

2. *Termination of Employment*

Employment may be terminated as a result of political activity or upon reaching compulsory retirement age as provided in *The Public Service Act*. Termination for other cause is authorized as follows:

> A Deputy Minister may for cause dismiss from employment in accordance with the Regulations any public servant in his Department.[82]
>
> 31. (1) Where a public servant,
>
> (a) habitually fails to comply with attendance regulations or directives;
>
> (b) absents himself without permission during his prescribed hours of duty;
>
> (c) reports for duty while incapable of performing his duties;
>
> (d) misuses government property or uses government property or services for purposes other than government business; or
>
> (e) fails to obey the instructions of his superior,
>
> and where, in the opinion of his deputy minister, the circumstances do not amount to cause for removal from employment or dismissal under section 22 of the Act, the deputy minister, or an official of his department who is authorized by him, may, after a hearing, impose a fine equal to not more than five days pay.
>
> (2) Before dismissing a public servant for cause or removing him from employment for cause, the deputy minister or an official of his department who is authorized by him, shall hold a hearing at which the public servant is entitled to be present and to make representations.[83]

After dismissing a public servant for cause, the Deputy Minister must give to the public servant the reasons for his dismissal and advise him of his right to a hearing by the Public Service Grievance Board.[84]

D. Assignment of Personnel

1. *Location of Crown Attorneys and Assistant Crown Attorneys*

The following Tables show the number of Crown attorneys and assistant Crown attorneys who are holding appointments in the various counties and districts throughout Ontario as of April 1, 1973 and the classification of all Crown attorneys and assistant Crown attorneys holding appointments as of the same date.

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[82]R.S.O. 1970, c. 386, s. 22(3).
[83]R.R.O. 1970, Reg. 749, s. 31(1)(2).
[84]*Ibid.*

TABLE I

LOCATION OF CROWN ATTORNEYS AND ASSISTANT CROWN ATTORNEYS

	Crown Attorneys	Assistant Crown Attorneys
Algoma	1	2
Brant	1	1
Bruce	1	–
Cochrane	1	2
Dufferin	1*	–
Elgin	1	–
Essex	1	4
Frontenac	1	1
Grey	1	–
Haldimand	1*	–
Halton	1	1
Hastings	1	1
Huron	1	–
Kenora	1	1
Kent	1	1
Lambton	1	1
Lanark	1	–
Leeds & Grenville	1	–
Lennox & Addington	1	–
Middlesex	1	3
Muskoka	1	–
Niagara North	1	1
Niagara South	1	3
Nipissing	1	1
Norfolk	1	–
Northumberland & Durham	1	1
Ontario	1	1
Ottawa-Carleton	1	6
Oxford	1*	1
Parry Sound	1	–
Peel	1	3
Perth	1	–
Peterborough	1	1
Prescott & Russell	1*	–
Prince Edward	1	–
Rainy River	1	–
Renfrew	1	–
Simcoe	1	2
Stormont, Dundas & Glengarry	1	1
Sudbury	1	4
Temiskaming	1	–
Thunder Bay	1	2
Victoria	1	1
Waterloo	1	4
Wellington	1	1
Wentworth	1	4
York	2	33
	48	88

*Appointed on a fee basis.

TABLE II

CLASSIFICATION AND SALARIES OF ALL CROWN ATTORNEYS AND ASSISTANT CROWN ATTORNEYS

Legal Officer 1

$10,279	$10,697	$11,114	$11,558	$12,027	$12,497	$13,019	$13,540	$14,349
4	2	1	5	1	2	1	–	–

(All Assistant Crown Attorneys)

Legal Officer 2

$14,636	$16,149	$17,793	$20,010
9	7	5	6

(All Assistant Crown Attorneys)

Legal Officer 3

$16,228	$17,884	$20,102	$20,493
3	2	2	13

(All Assistant Crown Attorneys)

Legal Officer 4

$19,345	$20,493	$21,732
–	–	10

(All Assistant Crown Attorneys)

Legal Officer 5

$21,315	$22,580	$23,924
3	3	22

(15 Crown Attorneys, 13 Assistant Crown Attorneys)

Legal Officer 6

$24,028	$25,698	$27,498
1	–	12

(11 Crown Attorneys, 2 Assistant Crown Attorneys)

Legal Officer 7

$25,698	$27,498	$29,429	$30,029
–	1	12	1

(All Crown Attorneys)

Legal Officer 8

$27,498	$29,429	$31,490
–	–	3

(2 Crown Attorneys, 1 Deputy Crown Attorney)

Crown Attorney for Toronto and York

$32,742
1

Note: In addition to the above, there are at present four Crown Attorneys on a fee basis, acting in Dufferin, Oxford, Prescott & Russell and Haldimand.

Most of the 88 assistant Crown attorneys were appointed under section 2 of *The Crown Attorneys Act* for the specific county or district in which they prosecute. After the amendment to the Act in 1964 permitting appointments "for the Province", some assistant Crown attorneys were appointed for the Province. Whatever the purpose and intent of this amendment may have been, assistant Crown attorneys whose terms of appointment were province-wide are now, with the exception of a very few, attached permanently to a specific county or district and their assignments do not differ from those of an assistant Crown attorney whose terms of appointment are to a specific area. This is so notwithstanding the authority provided in section 1(2) of the Act for the Director of Public Prosecutions to direct an assistant Crown attorney to act anywhere in the Province.

There has always been a relative amount of voluntary mobility of personnel in the ranks of Crown attorneys and assistant Crown attorneys, and before 1964 where a Crown attorney or assistant Crown attorney prosecuted elsewhere than in the county to which he was appointed he was entitled to be paid on a *per diem* basis of $20 above and beyond his expenses and salary. This amendment was designed to abolish the *per diem* payment and although it has also the incidental effect of permitting the transfer of Crown attorneys and assistant Crown attorneys alike from county to county, it has not been in fact so used. The basic policy remains of appointing an assistant to a specific locality permanently.

The staffing requirements of Crown attorney's offices present unique problems.

In 1968, Ottawa-Carleton, Kent, Peel, Waterloo, Essex and York all sought the appointment of additional assistant Crown attorneys to relieve the existing staff. It was decided that before the appointments were approved the Advisory Services Division of the Treasury Board should make a study of professional staffing in County Crown attorneys' offices. The Advisory Services Division concluded that the number of assistants authorized for each office should be equivalent to the number of courts in operation so long as some advisory and administrative personnel existed. Of Ottawa-Carleton they wrote:

> The amount of time spent on non-court office work is much greater in total than in any other location visited with the exception of York (Toronto). Although it is less than twice the size of Essex (Windsor) in population, total provincial cases handled and criminal cases handled—Carleton has five times the clerical staff. This would seem to result partially from the fact that great care is taken to thoroughly prepare lower as well as higher court cases, prior to hearing. A great deal of clerical work is imposed on this office to effect and control this preparation which in other offices visited was largely left to court or police court liaison officers or was handled just prior to a lower Court session. Clerical control work is handled by four clerks under the direction of an office manager law clerk who also schedules Court appearances for the Assistant Crown Attorneys and part-time Assistant Crown Attorneys.
>
> The preparation of lower Court cases also has an effect on the amount of office work the professional staff undertake. The Assistant Crowns spend a good deal of time on a detailed review of law precedents, discussions with the police, witnesses and the Crown Attorney in preparation for cases.
>
> In short, the preparation and consequent control which is done on a lower court case may approach that for a sessions or assize trial . . . The Crown Attorney in Carleton operates in a fashion dissimilar to any other office visited. He has his assistants prepare lower court cases in a manner much the same as for the higher court. To allow adequate time for such preparation, Assistant Crown Attorneys are sent into court for not more than five appearances per week. This would seem

to be five half days per week. In practise this time is frequently less than five half days where the individual lower court sittings take less than half a day. As a consequence, part-time assistants must be used frequently to enable the five appearances limit to be observed.

The Advisory Services Division recommended against the appointment of an assistant Crown attorney for Ottawa-Carleton, and for areas where additional courts were being established recommended the appointment of an assistant Crown attorney for each court as it was established. The report also proposed appointments of an assistant to specific locations on the strict understanding that the appointee would serve as and when required in contiguous counties where the pressure of cases there necessitated such a course.

If the Ministry were to implement the recommendations of the Advisory Services Division, the problem of case preparation at the Provincial Court level will remain acute. Some 95% of criminal cases are determined at that level. The quality of the prosecutions in the Provincial Courts will suffer unless thorough case preparation is permitted.

The "one-man, one court" philosophy is simply the antithesis of professional standards. There must be personnel to permit adequate preparation during the work week at courts of all levels. It is also necessary that the Crown attorneys have time to engage in relevant legal research. Finally, allowances in staffing must be made for illness, vacations, and the engagement of assistants on protracted cases. Reliance should not be placed on part-time assistants (to be discussed later) to meet these circumstances which can be projected in advance.

We have come to the conclusion that the Advisory Services Division has based its recommendations on false premises. Unit standards, which might be capable of application to commercial institutions, are not the standards which can suitably be applied in this unique professional context. The efficiency of the criminal courts cannot be measured by the number of cases disposed of apart from the quality of justice dispensed.

We understand that at present staffing is based on a loose formula of 1,000 criminal cases per Crown attorney per year. It is recognized that this criterion is difficult to apply in geographic areas where Crown attorneys are required to devote considerable time travelling between courts and in those areas where they prosecute offences under Acts in addition to the *Criminal Code*.

The need for continuing flexibility in setting the complement of Crown attorneys is apparent. While it is important that guidelines be adopted, they should not be permitted to develop into rigid rules excluding the consideration of individual differences.

2. *Part-time Crown Attorneys*

The assignment and the location of Crown attorneys and assistant Crown attorneys must be considered with reference to part-time assistant Crown attorneys and the duties of the legal staff of the Ministry.

The Crown Attorneys Act provides:

> When a Crown attorney or an assistant Crown attorney is absent or ill or is unable to perform all his duties, the Deputy Attorney General may appoint a member of the bar of Ontario to act *pro tem* as Crown attorney or assistant Crown attorney, as the case may be, during the period that the Crown attorney or assistant Crown attorney is absent or ill or is unable to perform all his duties.[85]

On any given day a number of part-time assistant Crown attorneys are prosecuting in the Provincial Courts (Criminal Division) throughout the Province. It is departmental policy that a part-time assistant Crown attorney can be paid for his services only in the Provincial Courts, at preliminary inquiries and at inquests. Where the Crown attorney or permanent assistant Crown attorney cannot prosecute at an Assize or in the General Sessions of the Peace or County Court Judges' Criminal Court by reason of the pressure of his other duties or because of absence or illness, a member of the legal staff of the Ministry will often do so.

The appointment of part-time assistant Crown attorneys has been resorted to regularly by the provincial government. As at February 7, 1973, 289 part-time assistant Crown attorneys were available for prosecutions, having been appointed over the years. In the period April 1, 1972 to February 28, 1973, the part-time assistants were paid a total of $461,688. Of the 289 part-time assistants, 231 conducted prosecutions during this period. Some of them devoted a substantial part of their practice to this work, others devoted only a small portion.

Part-time assistant Crown attorneys are remunerated by authority of Order-in-Council 1750/67 at the rate of $20 per hour, or a maximum of $100 per day in the conduct of prosecutions and case preparation.

Table III at page 106 shows the number of part-time appointments made and fees paid from April 1, 1970 to February 28, 1973.

The sums expended on part-time assistants in most instances bears a direct relationship to the density of the population in the county or district. However, in the Judicial District of York, with a population of some 2,000,000, 17 of 23 part-time appointees billed fees of only $19,685 from April 1, 1972 to the end of February 1973, while in Peterborough, with a population of less than 150,000, 12 of 13 part-time assistants for the same period billed fees of $36,104.

Some of the less populous counties appear to make inordinate use of the part-time assistant Crown attorney.

The imbalance of fees and salaries paid to part and full-time assistant Crown attorneys respectively has had a demoralizing effect on the permanent staff. What is worse, the part-time assistant Crown attorney may well defend a case on which he has advised the police in his capacity as Crown attorney. Apart from any actual conflict of interest, the appearance of justice is not preserved when the roles of defence and Crown counsel are

[85]R.S.O. 1970, c. 101, s. 5.

TABLE III

ANALYSIS OF PER DIEM ASSISTANT CROWN ATTORNEYS' FEES

County or District	No. of Part-Time Appointees as at Mar. 15 1971	Apr. 10 1972	Feb. 7 1973	No. Receiving Payments Mar. 31 1971	Mar. 31 1972	Feb. 28 1973	Total Payments Made to Part-Time Appointees Apr. 1, 1970 to Mar. 31, 1971	Apr. 1, 1971 to Mar. 31, 1972	Apr. 1, 1972 to Feb. 28, 1973
Algoma	2	2	3	1	1	3	$ 5,608	$ 6,055	$ 14,549
Brant	2	2	2	2	2	2	3,670	4,404	152
Bruce	2	2	2	1	–	1	1,188	2,376	1,010
Cochrane	1	1	1	1	1	1	14,984	801	1,192
Dufferin	2	2	2	2	2	2	1,970	480	387
Elgin	3	3	4	2	2	3	5,044	6,612	9,153
Essex	8	8	12	7	6	9	10,495	8,255	6,831
Frontenac	8	8	9	8	8	8	20,709	14,657	33,963
Grey	1	2	2	1	1	2	778	1,728	4,097
Haldimand	1	1	2	–	–	2	–	–	115
Halton	9	9	9	7	8	8	6,876	7,994	13,032
Hastings	4	4	7	4	4	6	9,657	5,091	6,800
Huron	1	2	1	1	2	1	6,244	1,699	958
Kenora	1	2	3	1	1	2	2,033	1,606	9,551
Kent	4	3	3	3	3	3	6,974	1,418	1,493
Lambton	5	6	7	4	5	7	15,638	20,224	15,819
Lanark	1	1	1	1	1	1	2,830	2,266	1,566
Leeds & Grenville	8	8	8	5	5	6	13,297	13,370	17,699
Lennox & Addington	–	–	1	–	–	1	–	106	638
Lincoln (Niagara North)	8	7	7	5	6	7	7,567	4,060	4,920
Manitoulin	–	–	–	–	–	–	–	–	–
Middlesex	16	16	17	10	8	12	27,002	20,684	32,950
Muskoka	1	2	2	1	1	–	73	109	–
Nipissing	3	4	4	1	2	3	6,480	12,880	7,074
Norfolk	4	6	5	3	3	4	5,758	1,611	1,686
Northumberland & Durham	5	5	5	5	3	5	1,802	1,682	2,215
Ontario	5	5	8	3	3	6	7,534	7,539	10,114
Ottawa-Carleton	8	10	15	8	10	14	41,850	57,428	66,775
Oxford	6	6	5	2	2	2	433	–	444
Parry Sound	1	1	2	–	–	–	–	–	–
Peel	7	9	10	6	8	9	17,997	25,659	35,886
Perth	2	2	2	2	2	2	2,732	2,391	4,546
Peterborough	10	11	13	9	6	12	20,832	29,427	36,104
Prescott & Russell	–	–	–	–	–	–	–	–	–
Prince Edward	–	–	–	–	–	–	–	264	–
Rainy River	1	1	2	1	1	2	836	250	531
Renfrew	3	3	2	1	1	1	1,169	2,707	5,612
Simcoe	17	16	18	8	7	13	5,278	4,576	6,236
Stormont, Dundas & Glengarry	3	4	5	3	3	5	6,874	3,393	9,531
Sudbury	18	17	19	8	7	11	4,103	6,179	8,360
Timiskaming	5	5	5	2	2	2	390	1,884	2,092
Thunder Bay	4	4	6	3	3	6	5,666	7,297	10,476
Victoria & Haliburton	3	4	4	2	2	3	1,734	1,560	2,663
Waterloo	7	8	9	2	4	7	1,609	4,551	1,557
Welland (Niagara South)	5	4	3	2	2	2	2,965	1,307	670
Wellington	4	2	3	3	2	3	5,473	4,469	1,096
Wentworth	17	14	16	11	9	12	55,248	48,294	51,460
York-Toronto	19	20	23	10	13	17	18,900	6,913	19,685
TOTALS	245	252	289	162	162	231	$378,310	$356,256	$461,688

so closely intermingled. It is a totally unsatisfactory situation that a part-time assistant Crown attorney or a partner in his law firm may act in a civil case arising out of the same incident as a criminal case on which he acted or gave advice in his capacity as part-time Crown attorney.

The potential for abuse inherent in the system is recognized in relation to full-time Crown attorneys and assistant Crown attorneys in *The Crown Attorneys Act*.

(1) No Crown attorney or assistant Crown attorney shall, by himself or through any partner in the practice of law, act or be directly or indirectly concerned as counsel or solicitor for any person in

respect of any offence charged against such person under the laws in force in Ontario.

(2) *Subsection 1 does not apply to part-time assistant Crown attorneys.*[86]

The Crown attorney, as the local representative of the Attorney General, has an office of such importance in the administration of justice that it should not under most circumstances include a part-time officer. The potential for abuse is recognized by statute in relation to permanent officers and yet is open for part-time officers.

The employment of part-time assistants is not economical nor can its effect on morale ultimately lead to an enhancement of the status of the permanent official.

We recommend that a completely fresh approach be taken to the use of part-time assistant Crown attorneys. Part-time appointments should not be considered an acceptable substitute for permanent appointments. Permanent appointments should be made without delay to those counties and districts where the workload, both in and out of court, so warrants. In determining the need for the additional appointments, allowance should be made for vacations, predictable illness, and a policy of rotation of personnel to neighbouring counties or districts to equalize workloads. Our recommendations for the use of law clerks, students-at-law and retired police officers in summary conviction prosecutions are relevant in this context.

The use of part-time assistants should be reserved for unusual circumstances of a temporary nature, as when an Assize and County Court Judges' Criminal Court are scheduled to sit on the same day and there is no permanent official available to replace the full-time appointees in the conduct of prosecutions in the Provincial Courts. It should be made clear that it is improper for a part-time appointee when acting in that capacity to engage in the defence of criminal cases, and for him to act at any time directly or indirectly in a civil case arising out of the same incident as any criminal case in which he acted or gave advice as a part-time assistant Crown attorney.

3. *Regional Organization*

Crown attorneys are organized on an informal eight region basis as shown in Appendix IV. Each region has a chairman and secretary elected by the Crown attorneys in the region. The chairman is responsible for receiving the work schedules of Crown attorneys in the region and arranging for the assignment of personnel from one county to another in the region in order to equalize workloads. *Per diem* assistant Crown attorneys are supervised by the regional chairman.

While we are opposed to any changes in the appointment of Crown attorneys and their assistants to each county and district, we approve this

[86] *Ibid.* s. 10(1). Emphasis added.

method of ensuring mobility and alleviating imbalances in workloads. It would have the effect of further reducing the need for *per diem* appointments.

4. *Police as Prosecutors*

It has long been the practice for senior police officers to act as prosecutors at the trial of certain summary conviction offences coming before the Provincial Courts. These cases mainly involve such matters as breaches of municipal by-laws and *The Highway Traffic Act* and in some areas breaches of *The Game and Fish Act.*

Representations were made to us on behalf of the Ontario Association of Chiefs of Police that police officers should be relieved of all duties of prosecuting offences. In their brief they put it this way:

> While this activity is usually restricted to offences constituting a breach of Provincial Statutes or a Municipal By-law, and notwithstanding the fact that Section 47 Part IV of the Police Act of Ontario includes the prosecuting and aiding in the prosecuting of offenders in defining a police officer's duties, it is just as unacceptable as if it were the prosecution of criminal offences for like reasons, only more emphatically so, than those as stated in paragraph 1. In addition, it is highly unrealistic to expect a police officer, acting as a prosecutor, to demonstrate the same degree of impartiality in a case where the credibility of a fellow police officer is contested, as would be expected from a member of the Crown Attorney's staff. Perhaps more to the point, and at the risk of being repetitive, it is even more unrealistic to expect such procedures to be conducive to establishing public confidence in the courts or the police. It is difficult to understand why a procedure that is not practiced in the higher courts should be considered acceptable in courts at a lower level.

Others appearing before the Commission supported this submission.

We have not had any complaints that the police officers who perform these duties have been unfair or inefficient but many views have been expressed that the practice is undesirable in principle and creates distrust of the legal process in the minds of the public. In courts where the main witnesses are police officers and prosecutions are conducted by senior police officers, there is a natural inclination to conclude that the courts are police dominated. Under the present practice, it is inevitable that the system should be open to such interpretation. We have come to the conclusion that other means must be found for the prosecution of minor summary conviction offences. From recent announcements by the Attorney General, it would appear that he shares this view and that programmes are being prepared for gradual implementation to replace police as prosecutors.

Different solutions to the problem have been proposed to us. In the first place, all prosecutions should be under the direction and supervision of the Crown attorney. It would not be reasonable or realistic to require men or women with the qualifications necessary to be good Crown at-

torneys to devote a substantial part of their time to prosecuting summary conviction offences. That would be an inefficient use of qualified manpower. It may be that of the alternatives for the present practice which have been suggested some are suited to the conditions in certain areas of the Province and others are more suited to other areas. We consider three possible alternatives.

(a) *Law Clerks*

The use of law clerks in the legal profession has undergone considerable development in Ontario in recent years. Law Clerks, properly trained and attached to the Crown attorney's office could fulfill a most useful role. Specialized training of the sort necessary to fit interested applicants to perform these duties might be included in the curriculum of the community colleges. The course of study might be prescribed by the Ministry of the Attorney General in consultation with the Crown Attorneys' Association. It has been suggested that the Crown Attorneys School discussed below, provide forensic training for certified law clerks. We are not in a position to assess whether this would be a satisfactory substitute.

(b) *Retired Police Officers*

It may be possible to develop a corps of retired police officers who have had experience in prosecuting summary conviction offences who would act under the direction of the Crown attorney. This would not provide a permanent solution.

(c) *Students-at-Law*

In some Crown attorneys' offices, particularly Carleton and Frontenac, some law students have been employed during the summer months of their academic years and a few students-at-law have served their articles under the Crown attorney. While the Ministry of the Attorney General has made it a practice over the years to have articled students on its legal staff, it has not encouraged such a policy in the Crown attorneys' offices.

The increased use of articled students employed by the Crown attorney for summary conviction prosecutions deserves consideration. If a student proposes a career as a Crown attorney upon graduation such employment would enable him to acquire experience in the actual conduct of trials. The only serious drawback to the exclusive use of students-at-law in this capacity would be a want of continuity and a satisfactory supply. In the first three years of law school enrolment, his employment would be limited to the summer months only. In the articling period prior to entry into the Bar Admission Course, he would be available for one year. Whether or not he pursued a career within the Crown attorney's office upon graduation from the teaching portion of the Bar Admission Course, there would be a constant turnover in student prosecutors and a resulting want of continuity.

This source of supply must also be considered in the light of the MacKinnon Committee's Report on Legal Education to the Law Society.

The Committee's recommendation for the abolition of the articling period will be reconsidered by the Benchers later this year.

E. Instruction Briefs and Disclosure

1. *Preparation for Trial*

(a) *Provincial Courts (Criminal Division)*

In the larger metropolitan areas the Provincial Courts sit five days a week. Some of these courts sit through until late in the afternoon, while others may complete their work by noon. The courts do not sit exclusively in county towns but sit in various centres throughout the counties. Some sit as often as two or three times a week, some may sit bi-monthly. In northern Ontario as many as three of these courts may sit in one day with the Crown attorney and Provincial judge travelling long distances between courts.

In the large cities, Windsor, London, Hamilton, Toronto and Ottawa, the usual practice is for the Crown attorney to familiarize himself with the cases for the day during the period before court convenes. Usually there is a police officer of senior rank who acts as court officer on a permanent basis for the specific Provincial Court and is responsible for the brief for the Crown attorney. He advises the Crown attorney as to what cases are to be adjourned, proceeded with, withdrawn or those in which pleas of guilty are expected and the reasons therefor.

With exceptionally heavy court dockets in the metropolitan areas it is difficult for an inexperienced assistant Crown attorney to prepare a case adequately or to advise the police on the preparation of a case within the time available before the court commences. It has been the practice generally throughout the Province for the police to communicate with the assistant Crown attorney assigned to a given court well in advance of the trial date if the case is complex or presents unusual problems. In ordinary cases, however, instruction briefs are not, as a general rule, received from the police until the day of the trial and it becomes impossible to overcome any evidentiary defects which are then apparent, short of requesting adjournments.

Crown attorneys have a statutory duty to cause charges to be investigated further and to have additional evidence collected where necessary in order to prevent prosecutions from being delayed unnecessarily or failing through want of proof.[87] They will be unable to discharge this duty if they are not made aware of the Crown's case in advance of the day of trial. Adjournments at the time of trial to permit further preparation cannot be and should not be capable of being secured as a matter of course. Requests for adjournments cause inconvenience to witnesses and accused persons and should be rare in a system which is functioning properly. We recommend that the Provincial Director of Court Administration take immediate steps to develop systems for ensuring that Crown attorneys receive ade-

[87] *Ibid.* s. 12(a).

quate information for trial preparation. We make specific recommendations below for the appointment of an instructing Crown attorney at the "Old City Hall" in Toronto, where the problems of preparation appear to be most acute.

Problems Peculiar to Northern Ontario

Although prosecutions in the District Courts and Supreme Court present no problem in northern Ontario, preparation in the Provincial Courts is particularly difficult. Taking Thunder Bay as an example, courts will be held at Schreiber, Terrace Bay and Manitowadge on one day every two weeks. Every two weeks courts are held at Nipigon and Geraldton on the same day. Once a month, weather permitting, the court sits at Armstrong. These towns are located at least 125 miles from Thunder Bay and in some cases, over 125 miles from each other. Briefs could be mailed by the Ontario Provincial Police detachments to the courthouse at Thunder Bay and in cases of importance they are. In the majority of instances, however, the Crown attorney or his assistant sees the "confidential instructions" (popularly known as "dope sheets") only upon his arrival at the court.

The lists in these towns are not long, but as the court sits only once every two or three weeks, advice is sought from the Crown attorney when he arrives by members of the public and police alike. Accordingly, the opportunities for case preparation are as inadequate as in the larger cities. If a case must be adjourned for want of evidence, sometimes a genuine injustice may occur, as the witnesses and counsel may have come long distances. This problem is not peculiar to Thunder Bay. It exists throughout northern Ontario. In developing systems for ensuring information flow to Crown attorneys, the Provincial Director of Court Administration should have special regard to the problems unique to the north.

(b) *County Court Judges' Criminal Courts and General Sessions of the Peace*

We are advised that an administrator in the Toronto Crown attorneys office can delegate a case to an assistant for prosecution with ample time for preparation in the General Sessions of the Peace and in the County Court Judges' Criminal Court. So far as is known, elsewhere in the Province, including northern Ontario, there is sufficient time to prepare cases in these courts.

(c) *The Supreme Court of Ontario*

Throughout Ontario there has always been a sufficient time to prepare cases for trial in the Supreme Court. The experience of judges of the Supreme Court has been that too often Crown attorneys are assigned to prosecute in serious and difficult cases when they have neither the ability nor experience for the task. In the civil law it is common practice to retain particularly able counsel to present difficult cases. This practice should be equally true in the field of criminal law. Where a case involves difficult questions of law and evidence and entails a particularly difficult marshalling of the facts so that the case may be presented with clarity, experienced and skilful Crown counsel should be specially appointed. Such

counsel will usually be available among Crown attorneys. In proper cases, a less experienced Crown attorney or assistant Crown attorney should be appointed to assist. This is the best form of training for young assistant Crown attorneys.

2. *Coordination of the Flow of Information before Trial*

(a) *Provincial Courts (Criminal Division)*

It has been suggested to us that the root of the problem where there is lack of preparedness for trial lies with the police. First, it is said, there is a disinclination to send instruction briefs by mail lest they be lost. In some cases this may be valid but the problem would not appear to be insurmountable. It has also been suggested that some police officers are reluctant to disclose the Crown's case too far in advance of the hearing. If this does constitute a problem, we believe that it is one that can best be resolved by departmental discussion between the responsible Ministries.

In our view a more serious problem is presented with respect to disclosure to defence counsel.

At present, in Toronto, the Crown attorneys acting at "Old City Hall" often do not see the confidential instructions until the morning on which the related cases are scheduled. As a result, when the Crown attorney arrives, usually at about 9:15 or 9:30 a.m., a number of defence counsel will be waiting to talk to him about their cases. Others may try to confer with him in the courtroom or in the hallway prior to the opening of court or during adjournments.

Discussion at the remand stage is generally perfunctory as the information available to the Crown attorney is very limited. If defence counsel must wait until the time of trial for disclosure of the Crown's case, there is a danger that trials will be set unnecessarily pending receipt of the confidential instructions by the Crown attorney. On the other hand, there is a reluctance on the part of the police to prepare detailed statements of the evidence of witnesses unless it will be required by the Crown attorney at trial.

The coordination of Crown attorney services was the subject of Report in 1969 by the Advisory Services Division of the Treasury Board referred to above. Of the York County Crown Attorney's office it was said:

> This office functions as efficiently as it does particularly because of police cooperation in the administration of the lower Courts and assistance in procedural work within the Crown Attorneys office.
>
> The Crown Attorney has on his staff, an inspector seconded from the Metropolitan Toronto Police Force who acts as an administrative and liaison officer and this highly capable individual supervises the clerical office staff in the execution of office procedures, schedules the rotational assignments for Assistant Crowns plus cover off during illness and vacation, handles the liaison with the police on all routine court

matters and acts as supervisor for the police detective sergeants who are assigned to each of the lower criminal courts. These latter officers do much of the preparation for the Assistant Crown Attorneys prior to the opening of courts, such as reviewing the court docket, noting attendance of witnesses, reviewing the Crown's "dope sheet" and the myriad of petty details which could reduce the court efficiency if they were not attended to expeditiously. The Assistant Crowns are able to proceed with prosecution advocacy with the greatest despatch.

The Crown Attorneys organization in York could well serve as a model for other county offices as they grow in size.

The experience in York, however, did not prove satisfactory. We have been told that the office staff resented being supervised by a police inspector and that the Crown attorneys were embittered by the authority of the police inspector over them. They ascribed their difficulties in securing confidential instructions for the preparation of cases in advance of trial to police intrusion in their proper domain. This is but another example of an administrative accommodation adopted for reasons of expediency without adequate regard for matters of principle.

In 1970, the arrangement with the Metropolitan Toronto Police Force whereby the Inspector was seconded to the office of the Crown attorney was terminated. Supervision of the clerical staff was then delegated by the Crown attorney to a senior clerk. Non-professional administrative and liaison functions were assumed by a civilian coordinator. Police liaison fell to an experienced court officer.

Court assignments and emergency replacements in cases of sickness, vacation and overlapping of court assignments became the responsibility of the deputy Crown attorney and a full-time administrative senior assistant Crown attorney respectively. Liaison work with the police on routine court matters, such as the day-to-day scheduling of court officers for the Provincial Courts, the obtaining of judges' signatures to bring prisoners from custodial institutions to the courthouse as witnesses, the receiving of confidential instructions in advance of trial dates and the extensive communication with police sources became the responsibilities of a police inspector.

The Commission recommends that these arrangements be regularized in Toronto under an instructing Crown attorney to be assigned to the Provincial Court (Criminal Division) in Metropolitan Toronto. He should have no court duties during this assignment but should be responsible for the establishment and maintenance of the information flow between the police and Crown attorneys with respect to cases in this court. He should also establish and supervise a system of disclosure with defence counsel. Finally, under the direction of the Crown Attorney and Deputy Crown Attorney he should have responsibility concerning the assignment of Crown attorneys in the Provincial Court and should be in regular and close contact with the administrative clerk in that connection.

We recommend that the instructing Crown attorney be located at "Old City Hall" until our recommendations for decentralization made in

the previous chapter are implemented. (Following decentralization there should be an instructing Crown attorney for each of the new courthouses.) He should have adequate secretarial and clerical staff. In addition, at least three other assistant Crown attorneys should be assigned to assist him in carrying out his functions. While one of them might occasionally relieve in a particular courtroom in an emergency, they should be assigned primarily to the instructing Crown attorney's office for lengthy periods at a time. In the previous chapter we made recommendations for the assignment of four extra assistant Crown attorneys to "Old City Hall".

In establishing information flow from the police, clear procedures should be laid down. The minimum requirements for a first appearance should be that information which is necessary to allow the Crown attorney to deal with a show cause hearing or speak to sentence on a guilty plea. Where a trial is to take place, there must be information sufficient for the Crown attorney to conduct the prosecution. If complicated facts or questions of law are involved the Crown attorney should be informed well in advance.

Where there is a request from defence counsel for disclosure more complete information should be required. The instructing Crown attorney and his staff should be available in his office and accessible both personally and by telephone. As a precaution, defence counsel requesting disclosure may be required to give written evidence of their retainer.

Our recommendations concerning disclosure apply equally to all areas of the Province. It should be the responsibility of the Crown attorney in each county or district to develop and supervise proper systems. With a fair and efficient system of disclosure, trial dates can be set or guilty pleas entered at an early stage in the proceedings.

(b) *County Court Judges' Criminal Courts and General Sessions of the Peace*[87a]

The responsibility for coordination for the County Court Judges' Criminal Court and General Sessions of the Peace for the Judicial District of York lies largely with the "civilian" coordinator mentioned earlier. The coordinator was formerly a court clerk attached to the office of the clerk of the peace. His duties are to receive the confidential instructions after a bill has been returned by the grand jury or after committal for trial in the County Court Judges' Criminal Court and to handle at every stage all enquiries in relation to the cases from police and other witnesses, counsel, accused and other interested persons. In consultation with a senior assistant Crown attorney he assigns and distributes the cases to the assistant Crown attorneys appearing at trial. Matters of a professional nature are entirely in the hands of the assistants involved at the grand jury or at trial.

The coordinator acts as clerk of the Assignment Court established in 1969 and described in Part I, chapter 10, of this Report. The Court sets

[87a]In chapter 5, Part I, we recommended that the County and District Courts, County (or District) Court Judges' Criminal Courts and General Sessions of the Peace be reconstituted as a single court of record with only one name.

trial dates on the application of the Crown attorney and upon notice to the accused and his counsel when a mutually satisfactory date cannot be arrived at by the coordinator and the defence counsel. Where a case has already been set for trial, the Court is the forum at which any adjournment is sought. He notes the dates, keeps a record of available dates, keeps a record of proceedings at previous Assignment Courts if no court reporter is present and if the case in question has not been assigned to an assistant Crown attorney arranges for an assignment in consultation with a senior Crown attorney.

The coordinator is responsible for all non-professional aspects of the cases in the higher courts. He consults frequently with the senior County Court judge and the trial coordinator in the County Court regarding lengthy cases and the availability of judges to hear them.

We are advised that this method of coordination has been found to be eminently satisfactory in Toronto. It has been especially valuable in effecting court control in relation to prisoners in custody. Immediately upon the return of a bill from the grand jury or upon receipt of the County Court Judges' Criminal Court confidential instructions, the coordinator attempts to arrange with counsel an early trial date for those in custody. Failing agreement, the case is placed on the first available Assignment Court list where the Court can assume control of it. It is unusual for an accused to spend more than six weeks in custody once the coordinator has received the Crown brief.

We recommend for consideration the adoption of the coordinator system in large urban centres outside the Judicial District of York.

F. Education and Training of Crown Attorneys

1. *Opportunities for Education and Training Before Entering the Office of Crown Attorney*

Elementary courses in criminal law in the law schools in Ontario may incidentally allude to the office of Crown attorney but they do not provide specific academic content concerning the nature and function of his office.

The Criminal Procedure studies in the Bar Admission Course were for many years defence oriented. Recently the imbalance has been redressed somewhat by including as lecturers in the course an assistant Crown attorney from the Judicial District of York and two members of the legal staff of the Ministry of the Attorney General. The Crown Attorney for the Judicial District of York gives an annual lecture of one hour's duration outlining the nature of the office and some of its practical aspects.

It has been pointed out that it is not the general practice of the Ministry of the Attorney General to have students-at-law serve their articles under Crown attorneys in the counties and districts throughout the Province. The result is that few graduates from the law schools and the Bar

Admission Course have any practical knowledge of or appreciation of the functions of the Crown attorney.

2. *In-Service Training*

When a recently graduated barrister is recruited into a Crown attorney's office it is difficult to know whether he is intent upon the unique career on which he is about to embark or is merely seeking an opportunity to get experience in court. There are no formal educational or training programmes immediately available. As a general rule, each office has its own in-service training programme.

In the Judicial District of York, for example, the new assistant spends his first week becoming oriented to the surroundings and becoming familiar with the process of Crown briefing. He meets the personnel attached to the courts in which he will be appearing; examines the confidential instructions for Crown counsel, informations and bail bonds; studies the provisions of *The Crown Attorneys Act*; and observes police discussions with the Crown attorney in the period before court convenes.

Following his week of "orientation", the assistant spends one to two weeks observing the Crown attorney, or a senior assistant Crown attorney, in the actual prosecution of cases in the Provincial Courts. The new assistant accompanies the Crown attorney throughout the day, which usually begins with a morning conference with the Court officer (a police officer attached to the courts) before the appearance in court. Following the closing of court he may discuss with him any problems which have arisen.

Although variations in the type of initial training exist throughout the Province, usually two to four weeks after his appointment the assistant prosecutes cases. His first assignments will be in the Provincial Courts, and in the larger counties, in the courts hearing driving offences. As he gains experience and proficiency in the actual conduct of trials he progresses to other courts.

In Toronto, the assistant may well commence prosecuting at the Assize within five to six years of his appointment and, depending upon his ability, dedication and industry, conduct prosecutions before the County Court judge within a year of his appointment. In the smaller counties these periods are greatly reduced.

Experience gained in the day-to-day conduct of criminal trials and in the preparation for these trials customarily has been considered the only effective training for a Crown prosecutor. It is said that advocacy cannot be developed or the application of techniques mastered in any other way.

In our view the day-to-day contact with the trial of criminal cases does not in itself provide sufficient opportunity for the development of a philosophical appreciation of the role and function of the Crown attorney. There is little scope for learning new techniques, or scientific methods of proof, or for a comprehensive understanding of the basic principles of

criminal law as they apply to new social conditions and issues. It is essential to a good Crown attorney that he be exposed to this type of information.

In the early 1960's the late Henry H. Bull, Q.C., Crown Attorney for Metropolitan Toronto and York County and S. A. Caldbick, Q.C., the senior advisory Crown Attorney for the Province, with the concurrence of W. C. Bowman, Q.C., the Provincial Director of Public Prosecutions, inaugurated a programme of bringing assistants from the county units to Toronto for periods ranging from one to three months to acquire a broader base of experience by prosecuting at all criminal courts, except the Supreme Court of Ontario. This experiment lasted for approximately four years.

3. *Regional Meetings of Crown Attorneys*

Early in the 1960's Mr. Caldbick was instrumental in developing informal, localized regional meetings of Crown attorneys. The Province was divided into regions as set out in Appendix IV in which there was a mutuality of concern. The Crown attorneys from within these areas met on a more or less regular basis for the purpose of discussion and the exchange of ideas and viewpoints.

A system was devised by Mr. Caldbick for circulating the minutes of regional meetings to each Crown attorney in the Province. However, some of the regions have not been as active as others and some, such as Toronto, conducted meetings primarily of an internal administrative nature, and of little interest to Crown attorneys elsewhere.

We understand that the regional meetings are to be given fresh impetus under the recently appointed Director of Crown Attorneys. Meetings will be held at least four times a year at which designated topics will be discussed. Representatives of each region will then meet with the Director with a view to developing policies on matters of general concern.

4. *Meetings of the Crown Attorneys' Association*

A plenary annual meeting of the Crown Attorneys' Association is held in the spring of each year.[87b] The annual meeting, which lasts at least three days, affords an opportunity for a formal and informal interchange of views, and comparison of experiences by members from diverse areas of the Province. Some uniformity in procedures and standards may result.

During the last 10 years the fall executive meeting of the Association has taken the form of an educational seminar for all members of the Association. The seminar is of two days' duration. At the 1971 meeting, the *Bail Reform Act* and psychiatric evidence were the subjects on the agenda. The 1964 seminar was devoted exclusively to bankruptcy and commercial fraud.

The constitution of the Crown Attorneys' Association also provides for special general meetings. In 1969, a special educational seminar was

[87b]The constitution of the Crown Attorneys' Association appears in Appendix V.

convened to consider the effect of the omnibus bill amending the *Criminal Code.*

5. *The Crown Attorneys' School*

While the regional and Association meetings are beneficial in terms of continuing education, by the mid-sixties it was recognized within the Association that such meetings were unable to provide either an adequate educational base, both theoretical and practical, for the inexperienced assistant Crown attorney, or the intensive advanced base for the experienced Crown attorney and his assistants. The Association with encouragement and financial assistance from the then Department of Justice, established a Crown Attorneys' School with two courses each of one week's duration in August of each year. A description of the operations of the school and, for comparative purposes, of the proceedings of the National College of District Attorneys at the University of Houston in Texas is contained in Appendix VI. The school is held at Massey College in Toronto. Attendance is compulsory for all new appointees.

Apart from the provision of the facilities referred to, the Ministry has in the past placed no emphasis on professional development. Library facilities for some Crown attorneys and their assistants are inadequate. We are told that in the late 1960's, a copy of Tremeear's Criminal Code and Phipson on Evidence were deemed to be the only legal texts required by an assistant Crown attorney for the discharge of his duties. A Crown attorney may have a number of basic textbooks and a subscription to the Canadian Criminal Cases, but little regard is had to the number of assistants who must use them. In Toronto, for example, the Crown attorney, the deputy Crown attorney and 33 assistant Crown attorneys have been required to share three sets of the Canadian Criminal Cases. Those who have had experience in presenting and arguing cases in court know how important it is to have the essential authorities readily at hand. It is a sheer waste of valuable time to have Crown attorneys queuing up for essential books. These are elementary "tools of his trade" and he cannot function efficiently without them.

6. *An Information Service for Crown Attorneys*

In January 1973, an official information service was created as an adjunct to the office of Director of Crown Attorneys discussed earlier in this chapter. The service developed out of an unofficial service provided by one of the assistant Crown attorneys in the Judicial District of York. He reproduced and circulated reasons for judgment, together with research papers, articles from legal periodicals and memoranda of law on various topics. In May 1972, he instituted a monthly Crown Attorneys' Newsletter.

It is envisaged that the formal constitution of the office within the Ministry of the Attorney General will create a central clearinghouse for information on many relevant aspects of Crown attorneys' functions. It will be responsible for circulating to Crown attorneys statutes as they are

passed, relevant regulations, and reported decisions from many jurisdictions. Current problems will be discussed in circulars distributed periodically.

The information officer will continue to engage in the conduct of prosecutions to a limited extent, but will devote most of his time to the operations of the information service. It is anticipated that priority will be given to producing a looseleaf Crown Attorney's Manual and an instruction manual for new appointees.

It is to be hoped that the establishment of this office under the Director of Crown Attorneys will be a continuing contribution to the education and development of Crown attorneys who will be leaders of the bar in their respective communities. The experience in the past has been that Crown attorneys have not always had sufficient advance guidance affecting the conduct of their office.[88]

As a complement to the strengthening of the information service, we recommend that the facilities of the Crown Attorneys' School be extended. It should offer expanded courses of longer duration and should receive the financial support necessary to encourage extensive study and research.

G. Plea Negotiation

The subject of plea discussions (often referred to as "plea bargains" or "plea bargaining") has been much debated. It is not a recent phenomenon, but with the large volume of criminal cases reaching the courts a problem of serious proportions has developed in this Province. This has been exacerbated by an infiltration from the United States of what we regard as an unhealthy philosophy quite alien to our concept of an open, fair and public administration of justice. In some jurisdictions in the United States plea discussions have been institutionalized as an accepted part of the pre-trial court proceedings. In others, they remain formally unacknowledged and without judicial sanction.

The subject must be considered with a clear vision of the rule of law and the necessity for maintaining respect for the administration of the criminal law if it is to be an effective instrument in regulating society. Plea bargaining owes its existence to the necessity of disposing of a volume of cases without lengthy delays. An attempt is made by some to rationalize a system of inducing pleas of guilty to expedite the disposition rate in overloaded court dockets. When resources prove inadequate for the orderly processing of criminal cases, justifications for plea negotiations are most

[88]We are advised, for example, that when *The Residential Property Tax Reduction Act, 1968* (S.O. 1968, c. 118, in force January 1, 1969. Now repealed and superseded by S.O. 1972, c. 65) was introduced, few if any Crown attorneys were aware that it contained a provision for penal sanctions for the withholding of rental rebates. No guidance on the administration of the statute was provided to Crown attorneys. Similarly, the introduction of the new bail reform legislation in 1971 presented problems of administration for which the Crown attorneys had not been prepared.

vigorously advanced.[89] There should be no room in the administration of the criminal law for such a doctrine of expediency.

The subject ranges all the way from a consideration of the discretion vested in the Crown attorney to determine what charges should be proceeded with in a particular case, to a bargain made with the accused or his counsel that a plea of guilty will be entered if the accused is assured he will get a minimum sentence or will be placed on probation or have other charges withdrawn.

The abuses which are said to be inherent in this practice are that

(a) a false impression is created in the mind of the accused as to the extent of the influence of the prosecutor in securing a specific sentence;[90]

(b) there is a tendency towards the habitual laying of charges in a manner intentionally designed to put the prosecutor in the position to offer an apparent concession in the reduction of either the number or seriousness of charges. Overcharging, charging a more serious offence than would appear justified on the facts, and charging offences with a fixed minimum penalty, all fall into this category; and

(c) the existence of the practice leads to an expectation on the part of the accused that a "deal" will be offered and he may use delaying tactics (such as dismissing his counsel on the eve of trial or electing trial in another court when he intends to plead guilty eventually), simply for the purpose of exerting pressure on the prosecutor to offer a concession.

Much has been said and written about this subject, but in our view the principles are clear.[91]

In the first place, we consider the matter insofar as plea negotiations may be carried on with the police. In most cases the police officers lay the appropriate charge or charges arising out of the event that has given rise to police action. In many cases several charges may be laid arising out of the same facts, for example, an accused may be charged with breaking and entering a dwelling house with an intent to commit an indictable offence, having in his possession an instrument suitable for house-breaking and theft. All charges arise out of the same event. The breaking and entering

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[89]It has been suggested that plea negotiations lend flexibility to the administration of criminal justice by permitting the avoidance of unjustifiably harsh provisions of the substantive law; that they relieve the accused and the prosecution from the inevitable risks and uncertainties of trial; and that they serve law enforcement needs by permitting the exchange of leniency for information and assistance from accused persons.

[90]If the prosecutor is unable or unwilling to secure the court's concurrence in the sentence, the accused has no assurance that he will be permitted to withdraw his plea.

[91]Some examples from this jurisdiction are: Grossman, *The Prosecutor;* 1969 *Law Society Special Lectures* 267, 279; *Proceedings of the Canadian Bar Association,* Aug. 3-4, 1972.

charge carries a penalty up to life imprisonment. The penalty for possession of an instrument suitable for house-breaking may be up to 14 years and theft 10 years. It has been said to us that defence counsel frequently approach the police officer in charge of the case and seek to "make a deal" that a plea of guilty will be entered for the offence carrying the lightest punishment or an included offence; for example, where a charge is one of assault causing actual bodily harm, a proposition will be made by defence counsel that a plea of guilty will be entered for common assault (an included offence), which carries a much lower range for punishment. In return for the offer to plead guilty, the police officer is expected to temper his instructions to the Crown attorney. We are not making any findings as to whether such practices or similar practices exist but if they do exist we have no hesitation in condemning them. Police officers should not be involved in plea discussions either with the accused or defence counsel. The duty of the police officer is to marshal the evidence and report the facts to the Crown attorney and when he has done that his responsibilities cease and then pass to the Crown attorney.

When the Crown attorney has been instructed fully he must determine what charges should be proceeded with on the basis of the known facts. This is his duty as counsel representing Her Majesty, The Queen, in our courts. He must discharge this duty with fairness to the accused and fairness to the public. Bargaining with defence counsel has no place in the discharge of this duty.

As cases develop, however, the evidence obtained or given in the witness box may vary substantially from the statement given to the police or the Crown attorney in the first instance. It may become clear during the progress of the case that it is not likely that the court or a jury will find the accused guilty of the major charge laid in the indictment, or that where several charges have been laid it would be wrong to seek convictions on all charges. In such case the Crown attorney must elect the course he should pursue, having regard to all the circumstances. Defence counsel may offer a plea of guilty to an offence included in the major offence charged or one or more of several offences charged. If this is done, the Crown attorney must decide whether it is fair to the accused or required in the public interest to proceed further if the plea of guilty is entered. Here again, there is no room for bargaining. The Crown attorney exercises a quasi-judicial function attached to his office as Crown counsel for Her Majesty.

Up to the stage where defence counsel states that he will enter a plea of guilty to any charge, there should be no discussion with the trial judge and no promises concerning sentence. When that stage has been reached the provisions of section 534(6) of the *Criminal Code* may be applicable. It reads as follows:

> Notwithstanding any other provision of this Act, where an accused pleads not guilty of the offence charged but guilty of an included or other offence, the court may in its discretion with the consent of the prosecutor accept such plea of guilty and, where such plea is accepted, shall find the accused not guilty of the offence charged.

This provision was added as an amendment to the Code following the decision of the Ontario Court of Appeal in *R.* v. *Dietrich*,[92] in which the court held that a trial judge had no jurisdiction to accept a plea of guilty to non-capital murder on an indictment charging capital murder. The meaning of this section is not clear and particularly it is not clear whether it applies to the trial of cases other than on indictment. It appears in Part XVII of the Code, which is concerned with trials on indictment, but it may be broad enough to apply to all trials. Be this as it may, the principles we are discussing should apply to all trials.

When an application is made to the court to exercise the power conferred on it under section 534(6), it is proper to make representations supporting the acceptance of the plea of guilty. The court has a power but its exercise should be based on proper material. The material on which it is asked to act should be offered in open court. This procedure is an integral part of a criminal trial and no representations (except in very exceptional cases) should be made to the judge that are not made in open court. It is essential to public confidence in the administration of justice that all aspects of a criminal trial be conducted openly.

The power that the court exercises in deciding to accept a plea of guilty to an included or "other offence" and to enter a plea of not guilty to the offence charged is not an unfettered discretion but a judicial power to be exercised on proper material submitted publicly to the court. It is therefore clear that apart from very exceptional circumstances neither counsel for the Crown nor counsel for the accused either alone or together should discuss with the judge matters bearing on the exercise of the judge's power in the judge's chambers or any place other than in open court. If there are very special circumstances that make it necessary to discuss relevant matters with the judge in his chambers, a court reporter always should be present to take down the full discussion and it should form part of the record in the case. In our view, there should be no representations held out directly or indirectly concerning the sentence that may be imposed. The full responsibility for the conduct of the Crown's case lies on the Crown counsel and the responsibility for imposing the sentence lies on the presiding judge. He may listen to representations presented by the defence counsel and the Crown counsel and then, and only then, should there be any indication as to the sentence to be imposed. The fact that the accused has pleaded guilty is only one element to be taken into consideration but it is not an element that can be the subject of a "bargain".

The ultimate responsibility concerning this subject rests with the Attorney General who must determine the philosophy and practice to be applied. In our view legislation is not necessary. We recommend that the following guidelines be laid down for the guidance of prosecutors in respect of plea negotiations:

(1) Expediency should not be a consideration or a motive. The problems arising out of the burden of heavy caseloads must be solved

[92][1968] 2 O.R. 433.

by means other than negotiated pleas of guilty whether related to sentence or otherwise.

(2) The prosecutor should do nothing to induce or compel a plea of guilty to a reduced number of charges or a lesser or included offence.

(3) The prosecutor should permit to be maintained only those charges on which he intends to proceed to trial.

(4) The prosecutor should not agree to the acceptance of a plea of guilty to an offence that the evidence in his possession does not support.

(5) The prosecutor should not agree to the acceptance of a plea of guilty to a charge that cannot be prosecuted because it is barred by statutory limitation or otherwise.

(6) In all discussions with defence counsel the prosecutor must maintain his freedom to do his duty as he sees fit. Nothing should be said or done to fetter the freedom of the prosecutor and the defence counsel.

(7) The prosecutor may state to defence counsel the views he may give, if asked by the presiding judge to comment on the matter of sentence. No undertaking should be given relating to the term of sentence by the prosecutor. He may draw the attention of the presiding judge to any mitigating or aggravating circumstances that may appear to him and what the appropriate form of sentence might be, but it should be made clear that the matter of sentence is strictly for the judge and that any statement that is made cannot bind the Attorney General in the exercise of his discretion whether to appeal against the sentence or not.

(8) There should be no attempt to reduce the gravity of the evidence to suit the reduced charge.

(9) The prosecutor should always consider himself as agent of the Attorney General. The ultimate responsibility for disposition of the case must always rest with the court except in those cases where the Attorney General wishes to withdraw the charge.

(10) Apart from very exceptional circumstances neither counsel for the Crown nor counsel for the accused, either alone or together, should discuss a proposed plea of guilty with the judge in his chambers or any place other than in open court. Where attendance in the judge's chambers is dictated by very exceptional circumstances, a court reporter always should be present to take down the full discussion which should form part of the record of the case.

Together with guidelines to the Crown attorneys, instructions should be issued by the proper authorities to police officers. It should be made a matter of misconduct, for which a police officer may be disciplined, to discuss with an accused person or his counsel any arrangement to plead guilty to any offence on any understanding or undertaking with respect to sen-

tence or what charges will be prosecuted and what charges will not be prosecuted. The police officer should be required to make a full and fair disclosure to the Crown attorney of all relevant evidence and all relevant discussions that have taken place concerning the case. This disclosure should be facilitated if our recommendations concerning instructing Crown attorneys are adopted.

It is fair to assume that the Law Society of Upper Canada will co-operate in enforcing standards of professional ethics for defence counsel relative to the maintenance of the guidelines set for Crown attorneys and police officers.

In expressing our views as to the course of action that should be taken with respect to Crown attorneys we do not wish it to be implied that we are in any way criticizing them regarding their conduct in the matters considered. We have had close cooperation from the representatives of the Crown Attorneys' Association in formulating the guidelines that we are recommending, and we may say that the submissions of the Crown Attorneys' Association on this matter substantially conform to the guidelines we have developed.

Earlier we said that the matter of expediency ought not to be a consideration in carrying out the procedure laid down by the *Criminal Code*. There is no doubt that heavy caseloads may be more easily liquidated by negotiating pleas of guilty. To accede to the negotiation of pleas of guilty as a method of economizing on means to provide for the proper disposition of caseloads in the criminal courts is to resort to procedures that will corrupt the administration of justice and destroy it as an effective power in the regulation of society. It will destroy public confidence in the courts and create distrust and suspicion of favours. The real ligaments that hold society together are to be found in the fair, just and open procedures of the courts.

The conclusions we have arrived at are substantially the same as those arrived at by the National Advisory Commission for Criminal Justice Standards and Goals in the United States where the subject of plea bargaining has reached acute proportions. We may say our conclusions were arrived at and recorded before the publication of the National Advisory Commission's standard. The Commission proceeded on the principles that the conviction of an accused person should depend not on negotiation but on the evidence available to convict him and the sentence imposed should depend on the action which best serves rehabilitative and deterrent needs. The following are excerpts from the standard and commentary:

> As soon as possible, but in no event later than 1978, negotiations between defendants and their attorneys and prosecutors concerning concessions to be made in return for guilty pleas should be abolished. In the event that the prosecution makes a recommendation as to sentence, it should not be affected by the willingness of the defendant to plead guilty to some or all of the offences with which he is charged. A plea of guilty should not be considered by the court in determining the sentence to be imposed.

> The Commission . . . totally condemns plea bargaining as an institution and recommends that within five years no such bargaining take place. (See generally the opinion of Judge Charles L. Levin, concurring with the result in *People* v. *Byrd*, 12 Mich. App. 186, 162 N.W. 2d 777 (1968).) Basic to the Commission's position on plea negotiations is its conclusion that lack of resources should not affect the outcome of the processing of a criminal defendant and that it is not unrealistic to expect that the criminal justice system can and will be provided with adequate resources. Thus the Commission rejects the notion that plea negotiations should or must be retained in whole or in part as an accommodation to reality.[93]

We agree that the very fibre of the system of criminal justice is jeopardized if reliance is placed on a concept of plea bargaining as a means of dispatching the disposition of criminal cases.

H. Summary of Recommendations

Functions and Duties

1. Provincial judges, not Crown attorneys, should be charged with the responsibility to advise justices of the peace with respect to the performance of their judicial duties.

2. Crown attorneys should continue to be appointed for each county or district.

3. The office of clerk of the peace should be abolished and most of the duties required to be performed by the holders of the office should be imposed on the clerk of the County Court. Under particular statutes where the nature of the subject matter makes it appropriate for the clerk or registrar of another court to perform certain duties, the duties should be specifically imposed on such other officer. Crown attorneys should cease to be *ex officio* clerks of the peace.

4. Other duties of Crown attorneys which are of an essentially administrative or clerical nature might be transferred to other officials. Examples are the employment of interpreters under *The Administration of Justice Act* and the authorization for the payment of additional witness fees under *The Crown Witnesses Act*.

5. Crown attorneys should not be required by statute to act as *pro tempore* local registrar, county court clerk, surrogate registrar or sheriff when those offices become vacant.

Status

6. The provisions of *The Public Officers' Fees Act* and *The Crown Attorneys Act* as they relate to the appointment of Crown attorneys on a fee basis should be repealed.

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[93]Quoted in 4 C.J.N. 12-13.

7. *The Crown Attorneys Act* should be amended to provide for appropriate specifications for the appointment and advancement of Crown attorneys in the public service.

8. All the provisions of *The Public Service Act* should be reviewed and only those which are appropriate to govern the conditions of employment of Crown attorneys should be retained to supplement *The Crown Attorneys Act.*

Assignment of Personnel

9. There should be continuing flexibility in setting the complement of Crown attorneys. Guidelines for staff requirements are useful but should not be regarded as rigid rules excluding the consideration of individual differences.

10. A new approach should be taken to the use of part-time assistant Crown attorneys. Permanent assistant Crown attorneys should be appointed without delay to those counties and districts where the workload, both in and out of court, so warrants.

11. Part-time appointments should be kept to a minimum and the appointees called on to act only in unusual circumstances. It should be made clear that it is improper for a part-time appointee when acting in that capacity to engage in the defence of criminal cases and to act at any time directly or indirectly in a civil case arising out of the same incident as any criminal case in which he acted or gave advice in his capacity as part-time assistant Crown attorney.

12. Police officers should be relieved of prosecutorial duties in the courts.

13. They should be replaced by law clerks, retired police officers or students-at-law all under the supervision and direction of the Crown attorney.

Instruction Briefs and Disclosure

14. The Provincial Director of Court Administration should take immediate steps to develop systems for ensuring that Crown attorneys receive from the police adequate information well in advance to permit preparation for trial.

15. An instructing Crown attorney should be appointed to be located at "Old City Hall", Toronto, to be responsible for the establishment and maintenance of the information flow between police and Crown attorneys with respect to cases in this court, and under the direction of the Crown Attorney and Deputy Crown Attorney for the assignment of assistant Crown attorneys to the courts.

16. The instructing Crown attorney should have adequate secretarial and clerical staff and should have at least three other assistant Crown attorneys assigned to assist him.

17. The Crown attorney for each county and district, and the instructing Crown attorney at "Old City Hall" in Toronto under the supervision and direction of the Crown Attorney for the Judicial District of York, should develop and supervise systems of disclosure to defence counsel.

18. We recommend for consideration the adoption of the trial coordinator system for the County Court Judges' Criminal Courts and General Sessions of the Peace in large urban centres outside the Judicial District of York.

Education and Training of Crown Attorneys

19. The facilities of the Crown Attorneys' School should be extended to afford expanded courses of longer duration. It should receive the financial support necessary to encourage extensive study and research.

Plea Negotiation

20. The following guidelines should be laid down for prosecutors in plea negotiations:

    (a) Expediency should not be a consideration or a motive. The problems arising out of the burden of heavy caseloads must be solved by means other than negotiated pleas of guilty whether related to sentence or otherwise.

    (b) The prosecutor should do nothing to induce or compel a plea of guilty to a reduced number of charges or a lesser or included offence.

    (c) The prosecutor should permit to be maintained only those charges on which he intends to proceed to trial.

    (d) The prosecutor should not agree to the acceptance of a plea of guilty to an offence that the evidence in his possession does not support.

    (e) The prosecutor should not agree to the acceptance of a plea of guilty to a charge that cannot be prosecuted because it is barred by statutory limitation or otherwise.

    (f) In all discussions with defence counsel the prosecutor must maintain his freedom to do his duty as he sees fit. Nothing should be said or done to fetter the freedom of the prosecutor and the defence counsel.

    (g) The prosecutor may state to defence counsel the views he may give, if asked by the presiding judge to comment on the matter of sentence. No undertaking should be given relating to the term of sentence by the prosecutor. He may draw the attention of the presiding judge to any mitigating or aggravating circumstances that may appear to him and what the appropriate form of sentence might be, but it should be made clear that the matter of sentence is strictly for the judge and that any statement that is made cannot bind the Attorney General in the exercise of his discretion whether to appeal against the sentence or not.

(h) There should be no attempt to reduce the gravity of the evidence to suit the reduced charge.

(i) The prosecutor should always consider himself as agent of the Attorney General. The ultimate responsibility for disposition of the case must always rest with the court except in those cases where the Attorney General wishes to withdraw the charge.

(j) Apart from very exceptional circumstances neither counsel for the Crown nor counsel for the accused, either alone or together, should discuss a proposed plea of guilty with the judge in his chambers or any place other than in open court. Where attendance in the judge's chambers is dictated by the circumstances, a court reporter always should be present to take down the full discussion which should form part of the record of the case.

21. Together with guidelines to the Crown attorneys, instructions should be issued by the proper authorities to police officers to make it a matter of misconduct for which a police officer may be disciplined, to discuss with an accused person or his counsel any arrangements to plead guilty to any offence, on any understanding or undertaking with respect to sentence or what charges will be prosecuted or what charges will not be prosecuted.

APPENDIX I

THE RESPONSIBILITY FOR PROSECUTIONS— A COMPARATIVE ANALYSIS

1. *Scotland*[1]

Scotland permitted prosecutions by private individuals affected directly by a crime until the sixteenth century. In 1579 and again in 1587 the Scottish Parliament enacted legislation to curtail this power of private prosecution. These Acts did not negate all private privilege, but the Lord Advocate's power gradually eclipsed private prosecution.

The Lord Advocate directs and supervises the work of a handful of deputies and Procurators-Fiscal. The former are appointed and the latter nominated by him. Procurators-Fiscal conduct the bulk of the criminal prosecutions at the local level. They are permanent officials. In all but the most routine of summary offences, the local prosecutor must report to the central authority in Edinburgh. He will then be instructed as to the desired procedure and in addition a deputy may be sent to assist with or take over conduct of the case. The goals are uniformity of administration and efficiency.

The Lord Advocate is not only the state's public prosecutor but is also the chief law officer of the government. He sits in Parliament and is answerable thereto.

2. *The Continent*[2]

The continental European states have long had highly structured and centralized systems of public prosecution. Of interest are the training and apprenticeship procedures followed. Typically, prosecution is viewed as a career requiring special skills and a judicial orientation. Aspiring prosecutors and magistrates follow the same program of examinations, training and apprenticeship. Their involvement in the administration of criminal law includes the supervision and initiation of proceedings, investigation, pre-trial examinations and trial of criminal offences.

3. *The United States*

The office of the local public prosecutor appeared early in the history of some of the American colonies. The County of Philadelphia created such an office as early as 1685. The County of Hartford in Delaware has records relating to the local prosecutor's office from 1662. As in the case of Upper Canada, creation of the office marked a significant departure from the private prosecutor tradition of the English common law, and has been attributed to the influence of settlers from the continental European countries, particularly the Low Countries.[3]

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[1]This description of the Scottish system relies heavily on Normand, "The Public Prosecutor in Scotland" (1938), 54 L.Q. Rev. 345.

[2]For a comprehensive discussion of the continental system see Ploscowe, "The Career of Judges and Prosecutors in Continental Countries" (1934), 44 Yale L.J. 269.

[3]Alstyne, "District Attorney—a Historical Puzzle", [1952] Wis. L. Rev. 125; David, "Councillors and the Law Officers in the Colonies in America" (1963), 12 Am. U.L. Rev. 33.

The practice of electing public prosecutors has been peculiar to the United States. This apparently arose gradually in a few jurisdictions as a result of public protests over incompetent appointees.[4]

4. *England*

Although Great Britain does not have an equivalent system of public prosecutors, the general compatibility of the substantive and procedural criminal law with that of Canada invites a more detailed examination of their system for the prosecution of offences.

The Department of the Director of Public Prosecutions is the office of the public prosecutor for England and Wales, but the office's involvement in criminal prosecutions is limited to participation in at most 10% of the trials for indictable offences.[5] The police prosecute the vast majority of cases, with a small percentage handled by other government departments and private citizens. The police themselves may retain private solicitors[6] and counsel to conduct their prosecutions, but increasingly police forces are establishing solicitor's departments within the police organization.[7] The Director of Public Prosecutions employs a staff of solicitors (30 in 1966) who instruct barristers retained by the Attorney General. For the most part these barristers are retained on an *ad hoc* basis, although the six Treasury Counsel at the Central Criminal Court in London are retained permanently. These Treasury Counsel (the name is no longer meaningful) may have outside practices, and indeed may and do appear for the defence if available.[8]

It is interesting to note that the question of conflict of interest, or bias, has not been the issue that it has been in Ontario. Although there has been some pressure of late to abolish police prosecutions[9] there is little suggestion in the literature that the barrister who appears for both defence and prosecution might, psychologically at least, be in an ambivalent position. This may be due to the retention in Britain of a stronger sense of the role of the prosecutor as a relatively neutral figure in the conduct of a criminal trial.

The Director of Public Prosecutions is appointed by the Home Secretary but acts under the general supervision of and is responsible to the Attorney General. In practice he enjoys a high degree of independence. He is required to prosecute only serious indictable offences such as murder, to give advice to chief officers of police and to prosecute in cases referred by other government departments.[10] In addition there are certain

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[4]Frank, *Diary of a D.A., New York* 41 (1957).

[5]See Edwards, *The Law Officers of the Crown* 336; Devlin, *The Criminal Prosecution in England* 20.

[6]Devlin, *op. cit.* n. 5 *supra*, at p. 21. "The solicitor for the prosecution may therefore be a public servant employed for the purpose or a member of a firm which does much else besides criminal business; whichever he is, he exercises the ordinary privilege of the solicitor in choosing the barrister who is to present the case in court."

[7]*Ibid.* Scotland Yard has maintained its own solicitor's department since 1935.

[8]*Ibid.*

[9]Williams, "Advocacy by Public and Justices' Clerks", [1956] Crim. L.R. 169.

[10]See [1959] Crim. L.R. 5, 9, 250, 316, 484, 569, 759, 810; [1960] Crim. L.R. 243, 391.

categories of offences which the police are required to report to him in order that he may decide whether he proposes to conduct the prosecution himself and he may take up any case which appears to him to require his intervention.[11] The controlling statute is the *Prosecution of Offences Act, 1879*,[12] as amended.

The English public prosecutor plays a minimal role in prosecution today. This is not surprising given the history of the movement for the establishment of any public prosecutor at all. Devlin excludes the public prosecutor from his enumeration of successive basic institutions which have evolved for obtaining proof of a crime and instituting prosecution. First came the judge and grand jury, and the coroner and his jury; then the parish constable, the justice of the peace and, for offences of state, the Secretary of State. Finally the police forces took over the performance of this function. Each group evolved, from a body which was to take action on its own knowledge and initiative, into a formalized, judicialized structure, necessitating the creation of a new body to resume its initial function.[13] Edwards puts it this way:

> "Suffice it for our present purpose to recognize that, aside from the executive's continuous policy of investigating and prosecuting certain serious crimes against the state, such as treason and sedition, under the direct control of the Law Officers of the Crown, at the local level a pattern of successive groups of 'officials' first assuming and then later absolving themselves from responsibility can be seen over the centuries."[14]

Devlin maintains that the police have since evolved into a quasi-judicial body just as their predecessors did.[15]

It was pursuant to the rise of the police as agents of inquiry that the issue of public prosecution arose. Jeremy Bentham advocated what was termed a "mixed" prosecutorial system, that is, a system combining the "closed" French system of prosecution with the English "open" one. He reasoned that the duty of prosecution, being both bothersome and expensive, ought not to be placed upon the shoulders of private citizens. He noted also the perversion of the power of private prosecution engaged in by some for personal vengeance or gain. However he was unwilling to place the prosecution power exclusively in official hands.[16] The question was mooted by judges, government officials, parliamentary committees and others for the better part of the nineteenth century until the Act of 1879. Edwards traces the movement as follows:

> "Briefly, in 1824 Lord Denman described the want of a public prosecutor as an anomaly in the English criminal system. A plan to have Treasury Counsel prosecute all charges at the Old Bailey was proposed in 1834 but abandoned with a switch of governments.

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[11]Devlin, *op. cit.* n. 5 *supra.*
[12]42 & 43 Vict., c. 22 (U.K.).
[13]Devlin, *op. cit.* n. 5 *supra*, at p. 1.
[14]Edwards, *op. cit.* n. 5 *supra*, at p. 1.
[15]Devlin, *op. cit.* n. 5 *supra*, at p. 10.
[16]Edwards, *op. cit.* n. 5 *supra*, at p. 339.

Even prior to this 1834 plan, some rural counties maintained an 'informal' prosecutor. In 1854, Lord Campbell, in an unprecedented action, admonished the Attorney-General from the Bench for failing to provide public prosecutors. The next year brought the appointment of a Select Committee on Public Prosecutors. The following years witnessed the introduction of numerous private members' bills (e.g. Public Prosecutors Bill, 1871) which failed to receive widespread support in Parliament. Finally in 1873, the Home Secretary introduced a Public Prosecutors Bill. The wide scope of this legislation was narrowed by debate leading to the Prosecution of Offences Act, 1879."[17]

Amendments in 1884 required police chiefs to report indictable offences to the Director of Public Prosecutions. In 1904 the Director of Public Prosecutions took charge of the Treasury Counsel operating at the Old Bailey.[18]

APPENDIX II

INQUESTS ATTENDED BY CROWN ATTORNEY

April–December 1971

Algoma	20	Nipissing	5
Brant	1	Norfolk	5
Bruce	1	Northumberland & Durham	4
Cochrane	1	Ontario	7
Dufferin	1	Ottawa-Carleton	43
Elgin	2	Oxford	1
Essex	13	Parry Sound	6
Frontenac	3	Peel (Dec. not included)	11
Grey	4	Perth	3
Haldimand	2	Peterborough	0
Halton	3	Prescott & Russell	0
Hastings	3	Prince Edward	2
Huron	1	Rainy River	3
Kenora	3	Renfrew	3
Kent	3	Simcoe	6
Lambton	3	Stormont, Dundas, Glengarry	1
Lanark	2	Sudbury	29
Leeds & Grenville	1	Thunder Bay	19
Lennox & Addington	0	Temiskaming	1
Middlesex	14	Victoria & Haliburton	1
Muskoka	5	Waterloo	3
Lincoln: Niagara North	1	Wellington	4
Welland: Niagara South	6	Wentworth	22
		York (Jan.–Dec. 1971)	140 (approx.)
		TOTAL	412

[17] *Ibid.*
[18] *Ibid.* pp. 376, 391.

APPENDIX III

MISCELLANEOUS STATUTORY DUTIES AND POWERS OF CROWN ATTORNEYS

The Administration of Justice Act R.S.O. 1970, c. 6

Section 5 authorizes the Crown attorney to (1) retain and authorize payment for special services for the detection of crime or capture of a person suspected of having committed a serious crime, and (2) to employ interpreters at trials and inquests and to certify reasonable amounts for such services recoverable from the provincial appropriation for the administration of justice.

The Bail Act R.S.O. 1970, c. 37

Section 1 requires a Crown attorney after a committal for trial to deliver a certificate of lien to the sheriff of any county in which real property put up as security for bail is located. Upon discharge of the surety, section 7 charges the Crown attorney with the duty of delivering a certificate of discharge to the sheriff to whom the certificate of lien was transmitted.

The Child Welfare Act R.S.O. 1970, c. 64

A person having information concerning the ill-treatment of a child must by section 41 report the information to a children's aid society or Crown attorney.

The Crown Witnesses Act R.S.O. 1970, c. 103

Section 2(3) as re-enacted by S.O. 1971, Vol. 2, c. 5, s. 1 authorizes the Crown attorney with the approval of the Director of Public Prosecutions, to order the payment to witnesses of sums in addition to fees and allowances set out in the Act. Section 4, as amended by S.O. 1971, Vol. 2, c. 5 authorizes the payment of witness fees and allowances to be ordered by the Crown attorney if a trial is not proceeded with or a bill of indictment not preferred and the witness attended court in obedience to a recognizance or subpoena.

The Fire Marshals Act R.S.O. 1970, c. 172

By reason of section 3(j) the Fire Marshal must report to the Crown attorney any fire which appears to be the result of criminal negligence or design. Section 17(1) provides that the Crown attorney must upon receiving the report of the Fire Marshal conduct a prosecution under the *Criminal Code* or *The Fire Marshals Act* or the regulations thereunder of any person who appears to have contravened such enactments. By section 17(2) the Crown attorney must attend any investigation held under the Act and assist the Fire Marshal and examine witnesses when requested by the Fire Marshal.

The Highway Traffic Act R.S.O. 1970, c. 202

Section 142(1) obliges a Crown attorney who has knowledge of a fatal motor vehicle accident to make a written report to the Registrar of Motor Vehicles.

The Judicature Act R.S.O. 1970, c. 228

Section 88(2) provides that under certain circumstances the Crown attorney is *pro tempore* the local registrar of the Supreme Court of Ontario, County Court clerk or surrogate registrar.

The Liquor Control Act R.S.O. 1970, c. 249

Section 96 provides that the Crown attorney must prosecute any offences under this Act brought to him by a constable or officer appointed under the Act, by the Board or by certain officers of a municipality.

The Mining Act R.S.O. 1970, c. 274

Section 633(1) prescribes that the institution of prosecutions for offences against Parts IX or X of the Act may only be by an engineer, by leave of the Attorney General or by direction of the Crown attorney.

The Municipal Act R.S.O. 1970, c. 284

If a returning officer, deputy returning officer or poll clerk believes that any provision of the law as to secrecy at a polling place has been violated, he must report it pursuant to section 128 to the Crown attorney who must enquire into the matter and prosecute if he thinks proper.

The Parents' Maintenance Act R.S.O. 1970, c. 336

Before an information under this Act may be laid by anyone other than an apparently dependent parent, the consent of the Crown attorney is required by section 3 unless the prosecution is brought by a government agency, municipal authority or medical institution.

The Police Act R.S.O. 1970, c. 351

Section 59 authorizes the Crown attorney to request the services of the Ontario Provincial Police Force in any area in which a municipality or board is responsible for policing.

The Sheriffs Act R.S.O. 1970, c. 434

Section 21(2) provides that the Crown attorney shall be *pro tempore* sheriff where the latter office becomes vacant, and there is no deputy sheriff.

APPENDIX IV

ONTARIO CROWN ATTORNEYS REGIONAL ORGANIZATION

1. *NORTH EASTERN*

NIPISSING	– North Bay
SUDBURY	– Sudbury
PARRY SOUND	– Parry Sound
ALGOMA	– Sault Ste. Marie
COCHRANE	– Timmins
TIMISKAMING	– Haileybury

2. *NORTH WESTERN*

KENORA	– Kenora
RAINY RIVER	– Fort Frances
THUNDER BAY	– Thunder Bay

3. *CENTRAL*

MUSKOKA	– Bracebridge
SIMCOE	– Barrie
GREY	– Owen Sound
BRUCE	– Walkerton
DUFFERIN	– Orangeville
PEEL	– Brampton

4. *NIAGARA*

NIAGARA NORTH	– St. Catharines
NIAGARA SOUTH	– Welland
HALDIMAND	– Dunnville
WENTWORTH	– Hamilton
BRANT	– Brantford
NORFOLK	– Simcoe
HALTON	– Milton
WELLINGTON	– Guelph

5. *SOUTH WESTERN*

ESSEX	– Windsor
KENT	– Chatham
MIDDLESEX	– London
HURON	– Goderich
PERTH	– Stratford
WATERLOO	– Kitchener
OXFORD	– Woodstock
ELGIN	– St. Thomas
LAMBTON	– Sarnia

6. *SOUTH EASTERN*

ONTARIO	– Whitby
VICTORIA-HALIBURTON	– Lindsay
PETERBOROUGH	– Peterborough
NORTHUMBER-LAND-DURHAM	– Cobourg
HASTINGS	– Belleville
PRINCE EDWARD	– Picton
LENNOX-ADDINGTON	– Napanee
FRONTENAC	– Kingston

7. *EASTERN*

LEEDS	– Brockville
LANARK	– Perth
RENFREW	– Pembroke
OTTAWA-CARLETON	– Ottawa
PRESCOTT-RUSSELL	– L'Orignal
STORMONT, DUNDAS, GLENGARRY	– Cornwall

8. *YORK*

REGIONAL MUNICIPALITY OF YORK & METROPOLITAN TORONTO	– Toronto

APPENDIX V

THE ONTARIO CROWN ATTORNEYS' ASSOCIATION

Background

The Association was formed shortly after World War II with a view to advancing the cause of the Crown attorneys in relation to salaries. The Crown attorneys and assistant Crown attorneys in Ontario met annually. Until the late 1950's the meeting generally took the form of communal grievances about salaries and resolutions to increase them.

In the late 1950's the meetings evolved into a plenary discussion group considering questions submitted in advance by the membership. In 1963 as a result of an address made by the then Attorney General it was decided that the Crown attorneys themselves should strive to enhance their status and better their image. To this end a constitution was drafted for the Association and various committees were constituted.

Constitution

(a) *Objects*

The constitution was adopted and passed at a General Meeting of the Association on October 30, 1965. The purposes of the Association as stated in the Constitution are the following:

(a) To discuss and study the administration of criminal justice in Ontario.

(b) To discuss and study the criminal laws, quasi-criminal laws and laws relating thereto and to make recommendations to the appropriate authorities for the passage or amendment of such laws which will tend towards the better administration of criminal justice.

(c) To discuss and study problems in connection with the prosecution of crime and to gather and disseminate knowledge with relation thereto by appropriate means.

(d) *To promote and foster the continuing education of its members in matters relating to the prosecution of crime and administration of justice.*

(e) To discuss and study all matters pertaining to the status, duties, welfare and improvement of Crown Attorneys and make recommendations to the appropriate authorities concerning them.

(f) *To establish and maintain relations and conversations with other like Associations and law enforcement agencies towards a just and efficient enforcement of the criminal law and a due administration of criminal justice.*

(g) To promote and foster good public relations regarding the administration of justice.

(b) *Committees*

Article X, Section 1 of the Constitution provides:

The standing committees of the Association shall be

(a) The Committee on the Administration of Law and Justice.

(b) The Committee on Education.

(c) The Committee on Uniformity of Procedures.

(d) The Committee on Programs and Activities.

(e) The Committee on Information and Public Relations.

The Association has been particularly active in the field of education. It conducts the Crown Attorneys' School and appoints annually a representative to the Ontario Police College at Aylmer, Ontario.

APPENDIX VI

FORMAL TRAINING OF PROSECUTORS

1. *The Crown Attorneys' School*

In the first years of operation two identical courses were given in two weeks at the Crown Attorneys' School held at New College in the University of Toronto. It was designed to meet the needs of the basic legal and forensic education of the inexperienced Crown attorney. With the out-of-Toronto students living communally at New College it was hoped that the maximum benefit would be derived through daily lectures together with informal evening discussions. The lectures covered the whole of the criminal process, from both an administrative and prosecutorial point of view. Subjects included the structure of the Department of Justice (now the Ministry of the Attorney General), the history of the office of the Crown attorney, the Crown attorney's discretionary role in prosecutions, informations, evidence, jury trials, preparation for trial, sentencing and appeals. Lecturers were drawn from the bench and the bar, with the greatest reliance placed on the Crown attorneys themselves.

Recently, the format of the course has changed. The first week is devoted to the basic elementary course just described. An advanced course has been instituted in the second week. It has attracted federal Crown attorneys from the Yukon and Northwest Territories in addition to experienced Crown attorneys and assistants from this Province. Course content has included the criminal sexual psychopath, expert evidence, *res judicata* and analogous complex subjects.

Approximately 15 to 20 students attend the school each week. The basic course is obligatory for inexperienced assistants. In the past they have been designated to attend by the Director of Public Prosecutions, often on the nomination of a local Crown attorney. The advanced course although voluntary has enjoyed full attendance.

Lecturers have been encouraged by the course director (the Chairman of the Crown Attorneys' Association's Standing Committee on Education) to prepare their material in advance for circulation to the students and ultimate distribution to the Crown attorneys and assistants throughout the Province.

2. *The National College of District Attorneys at the University of Houston in Texas*

This course is of four weeks' duration. The following excerpt describes briefly the purpose and content of the course.

> The course will concentrate on functions and problems common to all prosecutors with emphasis upon five major subject areas.
>
> 1. The administration of criminal justice.
> 2. The office of District Attorney.
> 3. Constitutional Law Problems.
> 4. Trial techniques and case preparation.
> 5. Ethics and professional responsibilities.

> Subjects such as administration and office management, budgeting, data processing, information storage and retrieval and personnel management will be considered during a week-long analysis of the office of the public prosecutor. The appropriate exercise of discretion, career motivation for both clerical and professional staff and the role of the prosecutor as the chief law enforcement officer in his jurisdiction, will also be examined in depth. Naturally, attention will be given to recent developments in constitutional law, trends in court decisions and legislation, as well as case preparation and trial practice techniques. *It is contemplated, however, that the core of the career prosecutors Course will be an intensive examination of the office of prosecutor itself and its role and importance in the overall criminal justice system.*
>
> Instructors for the 1971 Career Prosecutors Course will again include prominent prosecutors, judges, legal educators and other professionals from across the country . . ."[1]

The following is the curriculum of the National College of District Attorneys.[2]

The Curriculum Committee developed certain planning assumptions for a Career Prosecutors Course, which were designed to accomplish the following goals:

(1) Increase the confidence of prosecutors in their ability to cope with the challenges and opportunities of their offices;

(2) Increase the professionalization of public prosecutors; and

(3) Afford an opportunity for an exchange of information between and among prosecuting attorneys, both student and faculty.

Early in the planning process it was determined that orientation and basic skills for novice prosecutors should be offered at the local level, usually on a state-wide basis by state prosecutor training directors, supplemented by the regional training programs of the National District Attorneys Association and other available resources.

The Curriculum Development Committee determined that the National College should focus its attention upon those functions and opportunities which are common to all prosecutors. It should explore in depth questions relating to the direction, purpose and goals of the prosecutor's office in contemporary society. . . .

Among the specific subtopics which will be considered, both during formal lectures and in the evening seminars, will be the following:

(1) *The Role of a Prosecutor.* This topic is designed to raise the

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[1]*The Prosecutor*, Vol. 6, N. 6, p. 391.
[2]*Ibid.* 391 ff.

following kinds of questions, with an opportunity for adequate discussion and perspective to be developed:

(a) What is the role of the prosecutor in court?

(b) What is his role as prosecutor outside of court?

(c) Does the prosecutor have a role to play in educating the general public about criminal prosecution problems?

(d) What role does the prosecutor play in bettering community relations? How does he cope with the sensitive questions of minority group problems in the community?

(e) What is his role vis-a-vis the State Attorney General? The County Counsel? The United States Attorney? The City Attorney? The Defense Counsel? The Police? The State Legislature? Regulatory Agencies?

(f) What is his role in law reform?

(2) *Administration of the Prosecutor's Office.* This sub-course is designed to focus attention upon the role of the prosecutor as chief administrator in the prosecutor's office. How does an elected District Attorney set policy for his office: by advisory committees? with the aid of outsiders? How can he develop the young talent in his office? How much should deputies be involved in making policy decisions? What are the proper goals of direction for a prosecutor's office? How does the prosecutor move from the mechanics of prosecution to the field of administration?

(3) *Office Management.* Herein an examination of the techniques of managing an office, budgeting, personnel development and recruitment, public relations, and familiarization with management theory, practices, techniques and supportive equipment.

(4) *The Inherent Powers of the Prosecutor.* This subcourse is designed to analyze the problems faced by the prosecutor in initiating a prosecution. What kinds of information must he have; what goals he seeks to accomplish by prosecution; what judicial standards influence his conduct? The ABA standards of criminal justice as they relate to the prosecution? Negotiation and plea bargaining — what criteria should control? Information needed? What is the proper role of the court and of the prosecutor in plea negotiations?

(5) *The Grand Jury.* This topic will examine the particular problems of the grand jury. What is the role of the grand jury? Is it a rubber stamp for the district attorney? Is it an independent accusatorial body, or is it a dependent inquisitorial body? In each of these cases, what is the role of the district attorney? Should the grand jury system be abandoned?

(6) *The Prosecutor's Discretion. When to Nolle Prosse; When to Recommend a Reduction in Charge; When to Recommend Probation.* What civil alternatives are available in the community? What goals are to

be accomplished by alternative methods? What information is required to decide properly?

(7) *Family Law.* The prosecutor's role in family law problems. The question of whether a purely intra-family dispute should be handled through criminal sanctions. What should be done about wilful failure to support a minor child? How best to record payments. When to prosecute for failure to pay. URESA. Paternity problems, when to prosecute and what standards should be followed. Crimes by juveniles; extradition; juvenile court procedure.

(8) *Evidence.* A survey of the rules of evidence most frequently used by prosecutors, with a particular emphasis upon simplifying and clarifying such rules.

(9) *Fair Trial — Free Press.* A discussion of the American Bar Association Proposals, the Reardon Committee Report and issues touching upon the prosecutor's role as a public official and a spokesman for law enforcement.

(10) *Drugs, Organized Crime, Gambling.* The role of the prosecutor in meeting the drug problem, whether the prosecutor has a function of education in addition to prosecution. Organized crime and the prosecutor. Civil alternatives to criminal prosecution for addiction; whether involuntary hospitalization is a meaningful alternative to imprisonment; half-way houses and other programs for rehabilitation.

(11) *Post-Conviction Remedies.* Procedures established by various states to provide adequate post-conviction remedies. Alternative methods of appeal and review with a focus upon the role of the prosecutor on appeal.

(12) *The Civil Jurisdiction of the Prosecutor's Office.* Civil injunction for riot control, pollution, consumer protection, poverty law, special service districts.

(13) *Civil Rights.* The responsibility of the prosecutor to disclose evidence known to him, the constitutional constraints upon the prosecutor's office as developed by the U.S. Supreme Court and federal courts. The role of the prosecutor in protecting civil rights as they may arise under state constitutions and statutes.

(14) *Corrections.* The correctional process; recent developments in correctional theory and practice; the responsibility of the prosecutor in the rehabilitation of the convicted offender; public and private medical versus state correctional systems.

Classes will be limited to a maximum of 100 students during each four-week session and will consist of morning sessions with afternoons free for individual research and study, followed by two-hour evening sessions in small group discussion format under the direction of an experienced

discussion leader. Discussion leaders will be experienced prosecutors, most of whom will be alumni of the National College.

There will be three classes of faculty: (1) Teaching Faculty will teach one of the topics identified, in a well-defined and organized manner with readings prescribed in advance of the class; (2) Resident Faculty — recent graduates of the National College and prospective teaching faculty — who will spend four weeks with the class and will direct the evening discussion groups; and (3) Guest Lecturers of interest within their particular area of expertise and professional ability.

Each one-month session will consist of two sections of 50 men each. This will mean that the teaching faculty in the morning will deliver their lectures twice: first to Section A and then to Section B. It will mean there must be resident faculty sufficient to divide the two sections into groups of about 8 or 10 men each for work in the evening. This will necessitate four to five resident faculty for each section, or a total of 10 per session, or 16 to 20 for the summer. The number of lecturing faculty will, of course, vary.

With the three classes of faculty and the work divided as described, it is assumed that the college would hold classes four mornings a week, Monday through Thursday, with classes beginning at 8 o'clock and ending at noon. At lunch lecturers will be invited to address the class. After supper, it is assumed that the class will be working with their resident faculty advisors in small groups of from 8 to 12 people. The faculty advisor will direct a discussion of the morning topics and help the group look ahead to the next day's topics. These sessions will meet Sunday through Wednesday evenings. Thursday night will be reserved for special events.

From Friday to Sunday night, the class would be engaged in planned field trips, such as a trip down the Houston Ship Channel to study industrial pollution and the technical, legal, political and practical problems of pollution control; a trip to Huntsville to visit the Institute of Contemporary Corrections and the Texas Prison System, where particular attention would be given to the new thrust in improving diagnostic services and individualized rehabilitation.

It would be the responsibility of the teaching faculty to make assignments for the morning lecture, and it is assumed that the class would be expected to read the assignments in advance. In time the College would publish these readings in case books. The resident faculty would be responsible for leading discussions each evening, and the curriculum assumes that the morning lecture topics and reading assignments would be so carefully prepared that there would be questions raised for discussion in the evening.

The practice of small group dynamics is fundamental to the success of the evening discussion groups. These small groups of 8 to 10 students, working together with their discussion leader for four weeks, will be able to stimulate each other, learn, and thus be able to function at a much higher level. This has been the experience at the National College for State Trial Judges, and they recommend this format as a very successful technique.

1971 Career Prosecutors' Course Syllabus

SUMMARY

Series	*Title*	*Hours*
100	The Criminal Justice System	12
200	The Office of District Attorney	14
300	Constitutional Law	16
400	Case Preparation and Trial Procedure	20
500	Legal Ethics and Professional Responsibility	6
	TOTAL HOURS	140

100 — THE CRIMINAL JUSTICE SYSTEM (12 Hours)

Sub-Course Number	*Title*	*Hours*
101	Introduction to the Criminal Justice System	1
102	The Police Function	5
103	The Defense Function	1
104	The Judicial Function	3
105*	Corrections	2
	*Corrections field trip will suppplement lectures	

200 — THE OFFICE OF DISTRICT ATTORNEY (14 Hours)

201	The Career Prosecutor and the Challenge of the Prosecutors' Office	1
202	The Prosecutor's Discretion — The Decision to Charge and Alternatives to Criminal Prosecution	2
203	Contemporary Problem Solving for Prosecutors	1
204	The Prosecutor and the Juvenile Court	1
205	Domestic Relations and Family Law Problems	1
206	The District Attorney as County Counsel	1
207	Office Administration and Management a. Law office layout, design, and construction b. Labor-saving machines and equipment c. The office library d. Office bookkeeping e. Records storage and informal retrieval f. The office procedures manual g. Utilization of professional staff h. Utilization of clerical staff i. Utilization of lay personnel j. The office budget	3
208	The Civil Legal Liability of the Prosecutor and the Police	1
209	Computers and the Law	1
210	The Prosecutor's Relationships with Others a. The public i. Victims of crime ii. Prosecution witnesses iii. Defense witnesses	2

Sub-Course Number	*Title*	*Hours*
	b. The police	
	c. The Courts	
	d. Defense Counsel	
	e. Other Prosecutors	
	i. City Attorney	
	ii. State Attorney General	
	iii. United States Attorney	
	f. Administrative Agencies	
	g. Local and State Governments	
	h. The Press	
	i. Others	
	300 — CONSTITUTIONAL LAW (16 Hours)	
301	Arrest	2
302	Search and Seizure	4
303	Stop and Frisk	1
304	Interception of Communications (Wiretapping, Eavesdropping and Electronic Surveillance)	2
305	The Right of Privacy	1
306	Statements, Admissions and Confessions	2
307	Lineups and Pretrial Identification	1
308	The Exclusionary Rule	1
309	Fair Trial — Free Press	1
310	Bail and Preventive Detention	1
	400 — CASE PREPARATION AND TRIAL PRACTICE (20 Hours)	
401	Case Preparation	1
402	The Preliminary Hearing	1
403	The Grand Jury	1
404	Pretrial Motions	1
405	Pretrial Discovery and the Duty to Disclose	2
406	Trial	14
	a. Selection of the jury	
	b. Opening statement	
	c. State's case	
	d. Cross-examination of the defendant's witnesses	
	e. Cross-examination of the expert witness	
	f. Rebuttal evidence	
	g. Demonstrative and scientific evidence	
	h. Meeting the defense	
	i. Closing argument	
	j. Instructions	
	k. Post-trial motions	
	l. Appeal	
	m. Collateral attack and Federal Habeas Corpus	

500 — LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY (6 Hours)

501	Code of Professional Responsibility	2
502	ABA Minimum Standards for the Administration of Criminal Justice	2
503	ABA Standards for Prosecution and Defense Functions	2

SEMINARS (32 Hours)

Four times each week students will meet with assigned faculty advisors for informal discussions of the subjects covered during the morning lectures.

Because the practice of small group dynamics is believed to be important to the success of the seminar program, each class will be divided into several small discussion groups.

Each discussion group will be assigned a faculty advisor who will be an experienced prosecutor. Faculty members will attend all lectures but will not participate as students in the morning exchanges between the teaching faculty and the regular student body.

Faculty advisors will direct and stimulate discussion during seminar sessions and will help their individual groups look ahead to the next day's lectures.

FIELD TRIPS (40 Hours)

1. Corrections Field Trip

Arrangements have been made with Dr. George Beto, Director, Texas Department of Corrections, to visit several major Texas correctional institutions early during the course. Staff members will be available to consult with students and to answer questions concerning contemporary corrections procedures and proposals.

2. Environmental Law Field Trip

Students will tour the Houston Ship Channel to Galveston, to study and observe environmental law problems. The legal aspects of air and water pollution and solid waste disposal from the prosecutor's viewpoint will be examined and discussed.

3. Judiciary Field Trip

An informal meeting with members of the local, state and federal judiciary will be scheduled during the third week of the course. Topics such as courtroom decorum, legal ethics and professional responsibility and prosecutor-judge relationships will be explored.

CHAPTER 3

SUMMARY OF RECOMMENDATIONS AND CONCLUSION

Chapter 1 Provincial Courts (Criminal Division)

Preliminary Matters

Structure of the Provincial Courts (Criminal Division)

1. The Provincial Courts (Criminal Division) of the various counties and districts should be reconstituted as a single court of record for the Province as a whole with a branch in each of the counties and districts. (p. 8)

Provincial Judges

2. *The Provincial Courts Act* should be amended so as to restrict eligibility for future appointments to the office of Provincial judge to those persons who are or have been members of the bar of one of the provinces of Canada for at least five years. (p. 9)

3. *The Provincial Courts Act* should be amended so as to provide as a condition precedent to the making of any appointment to the office of Provincial judge that the Attorney General request and receive a report from the Judicial Council. (p. 9)

4. The Chief Judge of the Provincial Courts (Criminal Division) should consider assigning newly appointed judges to sit for a certain period of time as observers in one or more courts presided over by experienced judges. (pp. 9, 10)

5. Persons actively engaged in the practice of law should not be allowed to sit as Provincial judges on a part-time basis. (p. 10)

6. A "pool" of retired Provincial judges should be built up, with representation from as many regions of the Province as possible, from which *ad hoc* appointments of part-time judges on a *per diem* basis can be made when extra judicial personnel are required due to illnesses or other emergencies. (p. 10)

7. The present salary levels for Provincial judges are too low. They should be raised so as to reflect more adequately the work which Provincial judges must perform and to encourage a larger number of well-qualified persons into seeking the office. (p. 11)

8. The salary levels for Provincial judges should be fixed by statute. (p. 12)

9. Salary ranges for Provincial judges should be eliminated, with all Provincial judges receiving the same salary, except for the Chief Judge and the senior judges. (p. 12)

10. Provincial judges should be exempt from the length of service requirements for sick leave applicable to civil servants and there should be no limitation on the number of days a judge may be absent owing to illness, such absence being properly documented. (p. 13)

11. Pension and disability benefits for Provincial judges and their dependants should be provided by statute on a non-contributory basis, in a manner similar to that for federally appointed judges. (p. 13)

12. The provisions laying down pension benefits for Provincial judges should not contain restrictions based upon payments received for sitting on a *per diem* basis. (p. 13)

13. All Provincial judges should receive one month's annual vacation. (p. 13)

14. Consideration should be given to the granting of a period of leave for Provincial judges every five years, on the approval by the Chief Judge of a proposed programme of study or research. (p. 14)

15. *The Marriage Act* should be amended so as to relieve Provincial judges of their duties with respect to the solemnization of marriage. (p. 15)

16. *The Master and Servant Act* should be reconsidered and amended so that the jurisdiction granted under the Act with respect to directing the payment of wages is transferred from Provincial judges to the Small Claims Court or Small Claims Court judges. (p. 15)

17. Section 12(2) of *The Provincial Courts Act*, which permits a judge with the previous consent of the Attorney General to act as arbitrator, conciliator or member of a police commission, should be repealed and judges of the Provincial Courts (Criminal Division) should be specifically prohibited from so acting. (p. 16)

Justices of the Peace

18. A complement of justices of the peace should be appointed for each of the counties and districts in Ontario, with the number of justices of the peace to be appointed to each county and district being set by regulation. (p. 17)

19. Justices of the peace should not be permitted to exercise their powers outside the county or district to which they are appointed. (p. 17)

20. There should be close supervision and control over justices of the peace by Provincial judges, with ultimate responsibility for supervision and control being exercised by the Chief Judge of the Provincial Courts (Criminal Division). (p. 17)

21. Section 6 of *The Justices of the Peace Act* should be replaced by a provision requiring a justice of the peace to exercise such duties conferred upon him by federal or provincial legislation as may be assigned to him by a Provincial judge. (p. 18)

22. The power given to Crown attorneys under *The Crown Attorneys Act* to "advise justices of the peace with respect to offences against the laws in force in Ontario" should be conferred on Provincial judges as part of their general supervision over justices of the peace in their county or district. (p. 18)

23. Court clerks should not be allowed to sit in court as justices of the peace to conduct trials after a full day's work carrying out other duties. (p. 18)

24. Justices of the peace should be appointed generally on a full-time basis. In remote areas, where the appointment of full-time justices of the peace may not be warranted, suitable government officials should be appointed to act as justices of the peace on a part-time basis. (p. 18)

25. Section 8 of *The Justices of the Peace Act*, which provides for payment of fees or allowances to justices of the peace, should be repealed and justices of the peace should be paid on a salary basis only. The salary should be commensurate with the duties required of the office. (pp. 18, 19)

26. A provision should be enacted in *The Justices of the Peace Act* prohibiting the exercise of any of the powers of justice of the peace except by a justice of the peace receiving a salary as such. (p. 19)

27. Section 2(2) of *The Justices of the Peace Act*, which provides that a person other than a barrister cannot be appointed as a justice of the peace unless he has been examined and certified by a County Court judge, should be repealed. (p. 19)

28. A Justices of the Peace Council should be established, to be composed of the Chief Judge of the Provincial Courts (Criminal Division), one additional Provincial judge, one justice of the peace and two other persons appointed by the Lieutenant Governor in Council. The functions of the Council would be to consider the proposed appointments of justices of the peace and to report thereon to the Attorney General, to receive complaints respecting the misbehaviour of or neglect of duty by justices of the peace and to take appropriate action with respect to the investigations thereof. (p. 19)

29. The Attorney General should be required to request and receive a report from the Justices of the Peace Council prior to making appointments to the office of justice of the peace. (p. 19)

30. The present educational programmes for justices of the peace should be expanded, and basic training should be provided in such matters as statutory interpretation and the admissibility of evidence in order that justices of the peace may discharge properly the judicial duties imposed upon them. Responsibility for developing educational and training programmes should rest with the Chief Judge of the Provincial Courts (Criminal Division). (p. 20)

The Chief Judge and Senior Judges

31. *The Provincial Courts Act* should be amended to state more explicitly the authority and duties of the Chief Judge and senior judges. Such duties should be specified in the Act itself rather than in the regulations made pursuant thereto. (p. 21)

32. Among the duties envisaged for the Chief Judge, apart from that of participating in the adjudicative processes of his courts, would be the following:

(1) assigning Provincial judges throughout the Province and arranging sittings;

(2) exercising general supervision and control over Provincial judges and justices of the peace;

(3) developing and supervising educational and study programmes for Provincial judges and justices of the peace;

(4) establishing guidelines on policy matters related to practice and procedure with a view to encouraging unformity of judicial practice; and

(5) drawing to the attention of the Attorney General imminent retirements or resignations of judicial personnel, as well as vacancies which have not been filled. (p. 22)

33. The Chief Judge should be given a highly qualified executive assistant to assist him in the carrying out of his administrative responsibilities. (p. 22)

34. The senior judges should be required by statute to carry out within their respective regions, under the direction and supervision of the Chief Judge, such duties as may be assigned to them by the Chief Judge. (p. 22)

35. Judges should be designated as senior judges for a three year term, subject to reappointment, and the Attorney General should be required to consult with the Chief Judge prior to making any such appointments. (p. 22)

Places of Sittings

36. The present organization of the sittings of the Provincial Courts (Criminal Division) should be reconsidered by the Chief Judge in consultation with the Provincial Director of Court Administration and the Regional Directors of Court Administration, in the light of changes in such conditions as transportation facilities and court workloads. The organization of the sittings should be continually reviewed. (pp. 23, 24)

37. In outlying areas, sittings should be scheduled more on an *ad hoc* basis as the volume of cases requires, with reliance also being placed on the use of part-time judges on a *per diem* basis where the use of full-time judges would result in a disruption of case scheduling in other areas. Justices of the peace could also be assigned small "circuits" within the county or district to deal locally with matters within their jurisdiction, in order to lessen the amount of time spent travelling by Provincial judges. (p. 24)

Administrative Personnel

38. Administrators or court clerks operating at the local level should be referred to as "administrative clerks". (p. 24)

39. No person should be appointed as administrative clerk to a centre having a population exceeding 100,000 persons who does not have qualifications at least equal to those of a person at the level of Executive Officer 1. (p. 25)

Physical Facilities

40. Courtrooms and court facilities should be such as to permit the administration of justice with the degree of dignity necessary to encourage respect for the law. (p. 26)

Role of Police Officers in Court

41. Police officers should be removed from their present role as court officers and appropriately trained civilian personnel should be added to the court staff for such purposes as maintaining security and serving as ushers. Police officers should also be removed from their present role with respect to case scheduling. (p. 27)

42. Responsibility for transporting prisoners between correctional institutions and the courts should be placed clearly in the hands of the staff of the correctional institutions. (p. 27)

Witnesses

43. The daily allowances for witness fees, together with the related travel and living expenses, should be increased so as to lessen the financial losses suffered by those persons required to attend as witnesses and to reflect properly their important role in the administration of justice. (p. 28)

Administration: Criminal Offences

Systems of Administration in Ontario Generally

44. Systems of administration at the local level in the Provincial Courts (Criminal Division) outside Metropolitan Toronto should be formalized locally, with each locality where the Provincial Court sits committing its system for disposing of cases to writing. The Crown, defence counsel and the administrative clerk should be consulted with respect to introducing modifications. A description of the system should be posted at the local courthouse and distributed to members of the local bar. This process of formalizing systems of administration should start immediately. (pp. 36, 37)

45. The responsibility for reviewing and further developing systems of administration should rest with the Regional Directors of Court Administration, in consultation with the Chief Judge and senior judges. (p. 37)

Metropolitan Toronto

46. The administration of justice in the Provincial Courts (Criminal Division) in Metropolitan Toronto should be decentralized, with the daily volume of cases being broken down and dealt with by a number of separate and independent administrative systems, each located in a separate decentralized courthouse with a complete establishment of judicial, court and Crown personnel assigned on a long-term basis (including an administrative clerk responsible for the scheduling of cases on a day-to-day basis). (p. 42)

47. The degree of decentralization should be based upon the concept of the optimum number of cases that can be handled by a single unit on a regular basis under close judicial and administrative control. The volume of cases should be low enough to enable the cases to be dealt with in the first instance in one remand court, subject to personal supervision by the administrative clerk without a high degree of delegation or division of responsibility. (pp. 42, 43)

48. At least three decentralized courthouses should be built in Metropolitan Toronto as soon as possible, with more being built as future circumstances warrant. (p. 45)

49. Consideration should be given to establishing a first appearance court sitting on a continual basis in the proposed decentralized courthouses. (p. 44)

50. The Law Society of Upper Canada and the Government of Ontario should review the existing situation with respect to the granting of legal aid certificates with a view to ascertaining how such certificates may be obtained more expeditiously and whether, to this end, a branch of the Legal Aid Office should be situated in each of the decentralized courthouses. (p. 45)

51. The new courthouses should have proper facilities for holding prisoners. (p. 45)

52. Until such time as courthouses can be built in accordance with the foregoing requirements, consideration should be given to leasing buildings to serve as courthouses. (p. 46)

53. "Old City Hall" should not continue to be used to house the Provincial Courts (Criminal Division) in Metropolitan Toronto for any longer than is absolutely necessary. (p. 46)

54. A senior judge should be appointed immediately for the region which includes Metropolitan Toronto. (p. 47)

55. Insofar as "Old City Hall" continues to serve as a courthouse in Metropolitan Toronto prior to implementation of our proposals with respect to decentralization, an administrative clerk should be appointed immediately at "Old City Hall" to be responsible for the day-to-day scheduling of cases. (p. 47)

56. Four extra Crown attorneys should be assigned immediately to "Old City Hall". (p. 48)

57. The four Provincial judge vacancies in Metropolitan Toronto should be filled immediately. (p. 48)

58. The regular establishment of judges in Metropolitan Toronto should not be drawn upon in order to meet the needs of other areas. (p. 48)

59. In order to establish the expectation of all parties concerned that trials will proceed on the date set and to lessen delays, an attempt should be made to demarcate more clearly the remand courts from the trial courts at "Old City Hall". (p. 49)

60. Where circumstances warrant, trials should be fixed for half-days or scheduled by the hour. (p. 50)

61. Judges should be assigned to remand courts on a one day per week basis rather than for five days per week for one month at a time. (p. 51)

62. Cases should be remanded for periods of seven days or multiples of seven days in order to provide for some continuity between individual judges and particular cases. (p. 52)

63. Where "specialty" courts are established judges should also be assigned to them on a one day per week basis. (p. 52)

64. Certain steps should be followed before a case is forced on to trial, such as the court warning the accused of the consequences of not

being represented by counsel and ordering that the proceedings should be recorded by the court reporter and a transcript made available to the trial judge as required. (p. 54)

65. Remand courts should commence prior to the regular court times, in order to lessen court scheduling conflicts for counsel. (p. 55)

66. *The Law Society Act* should be amended so as to render the failure of counsel without lawful excuse to appear as scheduled a provincial offence. Such counsel should also be reported to the Law Society of Upper Canada for possible disciplinary action. (p. 56)

67. Trial judges should take the same strict attitude with the Crown as with defence counsel with respect to proceeding at the time and on the date scheduled. (p. 57)

68. The system of scheduling cases should be such as to discourage counsel from seeking remands in order to avoid a particular judge. (pp. 57, 58)

Administration: Provincial Offences

69. A greater degree of separation than exists at the present time should be effected, for purposes of disposition, between the more serious and the less serious types of provincial offences. (p. 63)

70. Those provincial offences which carry with them more serious penalties should not be assigned by Provincial judges for disposition by justices of the peace but should, so far as is practicable, be dealt with by Provincial judges under the same procedure as that provided for criminal summary conviction offences, and subject to the recommendations put forward with respect to the administration of criminal offences. (p. 64)

71. Police officers should be removed from their role as prosecutors of provincial offences and should be replaced by law clerks, retired police officers or students-at-law under the supervision and direction of the Crown attorney. (p. 64)

72. Statutory provisions such as those contained in *The Liquor Control Act* and *The Liquor Licence Act* requiring prosecutions under a particular statute to take place before two or more justices of the peace where a Provincial judge is not available should be changed to permit prosecutions to be conducted before a Provincial judge or a single justice of the peace. (p. 65)

73. The entire range of applicable procedural provisions should be examined, with respect to the disposition of the less serious provincial offences, with a view to simplifying them and removing the anomalies and inconsistencies contained therein. (p. 65)

74. A separate procedure for the disposition of "infractions", namely municipal parking by-law violations and certain minor offences under *The Highway Traffic Act*, should be established. This procedure, details of which are set out in the text, would involve a ticket specifying the fine to be paid, an informal hearing by a justice of the peace in the absence of a prosecutor or police witnesses held pursuant to a "notice of infraction" sent by prepaid registered post upon the failure to pay the fine specified on the ticket, and the collection of fines through the administration of motor vehicle permits and drivers' licences. (p. 66)

Chapter 2 Office of the Crown Attorney

Functions and Duties

75. Provincial judges, not Crown attorneys should be charged with the responsibility to advise justices of the peace with respect to the performance of their judicial duties. (p. 88)

76. Crown attorneys should continue to be appointed for each county or district. (p. 88)

77. The office of clerk of the peace should be abolished and most of the duties required to be performed by the holders of the office should be imposed on the clerk of the County Court. Under particular statutes where the nature of the subject matter makes it appropriate for the clerk or registrar of another court to perform certain duties, the duties should be specifically imposed on such other officer. Crown attorneys should cease to be *ex officio* clerks of the peace. (p. 94)

78. Other duties of Crown attorneys which are of an essentially administrative or clerical nature might be transferred to other officials. Examples are the employment of interpreters under *The Administration of Justice Act* and the authorization for the payment of additional witness fees under *The Crown Witnesses Act.* (p. 94)

79. Crown attorneys should not be required by statute to act as *pro tempore* local registrar, county court clerk, surrogate registrar or sheriff when those offices become vacant. (p. 94)

Status

80. The provisions of *The Public Officers' Fees Act* and *The Crown Attorneys Act* as they relate to the appointment of Crown attorneys on a fee basis should be repealed. (p. 95)

81. *The Crown Attorneys Act* should be amended to provide for appropriate specifications for the appointment and advancement of Crown attorneys in the public service. (p. 99)

82. All the provisions of *The Public Service Act* should be reviewed and only those which are appropriate to govern the conditions of employment of Crown attorneys should be retained to supplement *The Crown Attorneys Act.* (p. 100)

Assignment of Personnel

83. There should be continuing flexibility in setting the complement of Crown attorneys. Guidelines for staff requirements are useful but should not be regarded as rigid rules excluding the consideration of individual differences. (p. 104)

84. A new approach should be taken to the use of part-time assistant Crown attorneys. Permanent assistant Crown attorneys should be appointed without delay to those counties and districts where the workload, both in and out of court, so warrants. (p. 107)

85. Part-time appointments should be kept to a minimum and the appointees called on to act only in unusual circumstances. It should be made clear that it is improper for a part-time appointee when acting in that capacity to engage in the defence of criminal cases and to act at any time directly or indirectly in a civil case arising out of the same incident as any criminal case in which he acted or gave advice in his capacity as part-time assistant Crown attorney. (p. 107)

86. Police officers should be relieved of prosecutorial duties in the courts. (p. 108)

87. They should be replaced by law clerks, retired police officers or students-at-law all under the supervision and direction of the Crown attorney. (p. 109)

Instruction Briefs and Disclosure

88. The Provincial Director of Court Administration should take immediate steps to develop systems for ensuring that Crown attorneys receive from the police adequate information well in advance to permit preparation for trial. (p. 110)

89. An instructing Crown attorney should be appointed to be located at "Old City Hall", Toronto, to be responsible for the establishment and maintenance of the information flow between police and Crown attorneys with respect to cases in this court, and under the direction of the Crown Attorney and Deputy Crown Attorney, for the assignment of assistant Crown attorneys to the courts. (pp. 113-14)

90. The instructing Crown attorney should have adequate secretarial and clerical staff and should have at least three other assistant Crown attorneys assigned to assist him. (p. 114)

91. The Crown attorney for each county and district, and the instructing Crown attorney at "Old City Hall" in Toronto under the supervi-

sion and direction of the Crown Attorney for the Judicial District of York, should develop and supervise systems of disclosure to defence counsel. (p. 114)

92. We recommend for consideration the adoption of the trial coordinator system for the County Court Judges' Criminal Courts and General Sessions of the Peace in large urban centres outside the Judicial District of York. (p. 115)

Education and Training of Crown Attorneys

93. The facilities of the Crown Attorneys' School should be extended to afford expanded courses of longer duration. It should receive the financial support necessary to encourage extensive study and research. (p. 119)

Plea Negotiation

94. The following guidelines should be laid down for prosecutors in plea negotiations:

(a) Expediency should not be a consideration or a motive. The problems arising out of the burden of heavy caseloads must be solved by means other than negotiated pleas of guilty whether related to sentence or otherwise.

(b) The prosecutor should do nothing to induce or compel a plea of guilty to a reduced number of charges or a lesser or included offence.

(c) The prosecutor should permit to be maintained only those charges on which he intends to proceed to trial.

(d) The prosecutor should not agree to the acceptance of a plea of guilty to an offence that the evidence in his possession does not support.

(e) The prosecutor should not agree to the acceptance of a plea of guilty to a charge that cannot be prosecuted because it is barred by statutory limitation or otherwise.

(f) In all discussions with defence counsel the prosecutor must maintain his freedom to do his duty as he sees fit. Nothing should be said or done to fetter the freedom of the prosecutor and the defence counsel.

(g) The prosecutor may state to defence counsel the views he may give, if asked by the presiding judge to comment on the matter of sentence. No undertaking should be given relating to the term of sentence by the prosecutor. He may draw the attention of the presiding judge to any mitigating or aggravating circumstances that may appear to him and what the appropriate form of sentence might be, but it should be made clear that the matter of sentence is strictly for the judge and that any statement that is made cannot bind the Attorney General

in the exercise of his discretion whether to appeal against the sentence or not.

(h) There should be no attempt to reduce the gravity of the evidence to suit the reduced charge.

(i) The prosecutor should always consider himself as agent of the Attorney General. The ultimate responsibility for disposition of the case must always rest with the court except in those cases where the Attorney General wishes to withdraw the charge.

(j) Apart from very exceptional circumstances neither counsel for the Crown nor counsel for the accused, either alone or together, should discuss a proposed plea of guilty with the judge in his chambers or any place other than in open court. Where attendance in the judge's chambers is dictated by the circumstances, a court reporter always should be present to take down the full discussion which should form a part of the record of the case. (pp. 122-23)

95. Together with guidelines to the Crown attorneys, instructions should be issued by the proper authorities to police officers to make it a matter of misconduct for which a police officer may be disciplined, to discuss with an accused person or his counsel any arrangements to plead guilty to any offence, on any understanding or undertaking with respect to sentence or what charges will be prosecuted or what charges will not be prosecuted. (pp. 123-24)

Conclusion

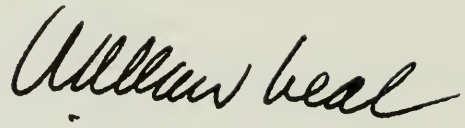
In Part I of this Report, we set out the terms of reference of our Project on Administration of Ontario Courts. We stated our decision to subdivide the topics under consideration into three Parts for the purpose of publication of our Report. Appended to Part I was a list of all those who made submissions to the Project and acknowledgements of the services of those who were retained to prepare materials relevant to Part I. Here we wish to express our gratitude to those who made contributions to Part II.

Our special thanks go to His Honour Judge Lloyd Graburn of the County Court and formerly Crown Attorney of the Judicial District of York, who generously acceded to our request to conduct extensive interviews and research on our behalf and submit a working paper on the Office of the Crown Attorney. We are indebted to Professor Stephen Borins, assistant dean, Osgoode Hall Law School, York University, for his able assistance in directing a wide ranging programme of empirical studies and to Professor Edward Ratushny of the University of Windsor Law School who performed with energy and discernment a difficult research assignment in connection with our study of the Provincial Courts (Criminal Division).

Miss Kathy Rose and Messrs. David Cruickshank, Ross Davis, Ronald Goldenberg, Joseph St. Michael, Sam Schwartz, Robert Harrison and John Willms, all law students at Osgoode Hall Law School, York University, aided us in our research endeavours. We wish also to pay tribute to those many members of the judiciary, court officials and particularly the representatives of the Crown attorneys and assistant Crown attorneys throughout the Province without whose cooperation this Report would not have been possible.

Finally, we wish to express our thanks to Mrs. Carol Creighton, assistant counsel to the Project, and Mr. John Layton, one of our legal research officers, for their efforts and skills which contributed greatly to the production of this Part.

All of which is respectfully submitted.



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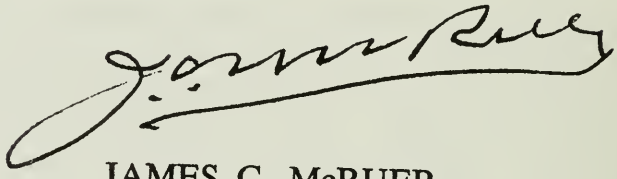

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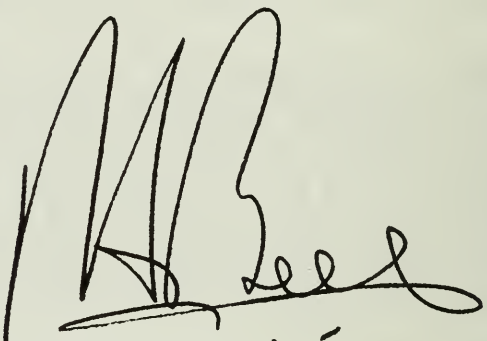

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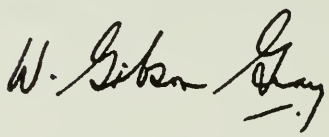

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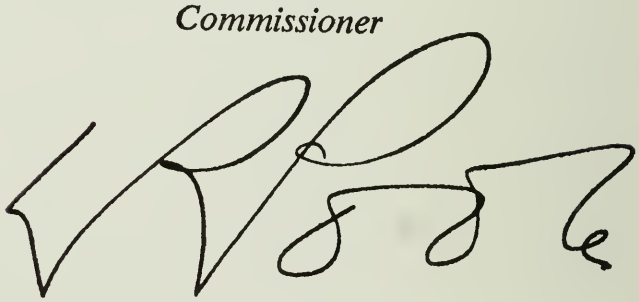

WILLIAM R. POOLE,
Commissioner

May 23, 1973.